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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 161

VIRGINIA VANDERBARK,

Petitioner,

vs.

OWENS-ILLINOIS GLASS COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

BRIEF ON BEHALF OF OWENS-ILLINOIS GLASS COMPANY, RESPONDENT

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A.

STATEMENT OF CASE

The parties herein will be referred to as they appeared in the District Court, the petitioner-appellant having been the plaintiff and the respondent-appellee having been the defendant.

This action was filed March 27, 1937, in the District Court of the United States for the Northern District of Ohio at Toledo, Ohio. The plaintiff seeks to recover damages for numerous occupational diseases alleged to have resulted from her employment by the defendant for the period of three months (March 1, 1935, to May 31, 1935), in

the laboratory of its factory at Newark, Ohio. In that factory, the defendant manufactured glass wool and other similar products made from glass. Petitioner alleges in her amended petition (R. 4), that she contracted the alleged occupational diseases as a result of respondent's negligence.

No claim is made in the amended petition that the plaintiff suffered an accident or any traumatic injury. The amended petition alleges three duties performed by her, (1) to test samples of the glass wool by separating the fibers so as to determine by weighing the number of good fibers in a given quantity of wool, (2) to perform the ignition test by placing specified amounts of glass wool in an oven, melting it, and thus determining the loss of weight due to the application of heat, and (3) to perform the tensile strength test upon the glass fibers to determine their strength as indicated by the amount of weight the fibers would hold before breaking. Plaintiff further says that the glass fibers were placed upon black velvet, to be counted and examined in making the above tests, and that the particles of fiber were then swept off the velvet with a small broom. She also alleged that chemical tests were run in the same laboratory and that there were often produced fumes and gases from such tests. Plaintiff averred that she breathed the air of the laboratory and that defendant, through its negligence, "inflicted upon her the condition of pneumoconiosis, silicosis, fibrosis, sinusitis, tuberculosis, allergic asthma, bronchiectasis, and has lowered her general bodily resistance to all disease" (R. 4).

Plaintiff does not mention specifically any statutes of Ohio which it is claimed were violated. The amended petition, however, contains one paragraph of general allegations that the defendant failed to furnish the plaintiff with safe employment and a safe place to work.

Notwithstanding the numerous allegations, vague and general in character, the action seeks to recover for occu-

pational diseases, to-wit, pneumoconiosis, silicosis, fibrosis, sinusitis, tuberculosis, allergic asthma, and bronchiectasis, all of which plaintiff is alleged to have acquired in her three months' employment with the defendant.

Defendant demurred to the amended petition on the ground that it did not state a cause of action. The demurrer was sustained by the District Court, and as the petitioner did not desire to plead further, final judgment was rendered for the respondent.

An appeal *in forma pauperis* was thereupon taken to the Circuit Court of Appeals for the Sixth Circuit. That court affirmed the judgment of the District Court and held that there was no error.

The basis of the judgment of the District Court was that under the law of Ohio, as determined by the Supreme Court of that state in numerous decisions construing the Ohio Constitution and Workmen's Compensation Act, there was no right at common law to recover damages for occupational disease.

Some four and a half months after the plaintiff's appeal was taken and had been docketed, the Supreme Court of Ohio, in the consolidated case of *Triff vs. National Bronze & Aluminum Foundry Co.*, 135 O. S. 191 (April, 1939), held on demurrer that despite the Constitution and Workmen's Compensation Act of Ohio, there was a right to recover at common law in Ohio damages for a non-compensable occupational disease. The Circuit Court of Appeals held that this decision of the Supreme Court of Ohio, overruling more than a quarter of a century of settled law in the State of Ohio, had no effect on the judgment of the District Court, and that as that court had regarded the laws of Ohio then in force in compliance with the mandate of *Section 34 of the Judiciary Act of 1789, 28 U. S. C. A. 725*, the judgment of that court should not be reversed. *110 F. (2nd) 310* (R. 13).

The case is before this court on petition for *certiorari*, granted October 28, 1940.

B.

THE OHIO LAW

1. Ohio Law at Time of Judgment of District Court.

Because of certain misstatements by plaintiff we shall briefly review the law of Ohio as it existed at the time the judgment of the District Court was rendered.

Basing its opinion on an admission made in the brief of counsel for the plaintiff in the Circuit Court of Appeals, the court below said:

> "It is *conceded* that when the court below dismissed the plaintiff's petition, it correctly applied the state law under the mandate of Section 34 of the Judiciary Act * * * as its rule of decision." (Italics ours.) (R. 15.)
>
> *110 F. (2d) at 312.*

The admission in brief of counsel, upon which that statement was based, is:

> "At the outset counsel for plaintiff-appellant admit that at the time of this writing the decisions by the Ohio State courts are contrary to the contention of this plaintiff-appellant in this cause * * *." (P. 4 of plaintiff's brief in Circuit Court of Appeals.)

That this admission or concession of counsel for plaintiff was not made carelessly or through inadvertence becomes clear from a review of the Ohio authorities. As the law of Ohio on this subject was thoroughly settled prior to the *Triff* decision, we merely direct the court's attention to the authorities and comment briefly with respect thereto.

Article II, Section 35 of the Constitution of Ohio, authorizes the passing of laws establishing a state fund out of

which to pay compensation for death, injuries, or occupational disease, and then provides:

> "* * * Such compensation shall be *in lieu of all other rights* to compensation, or damages, for such death, injuries, or occupational disease, and *any employer* who pays the premium or compensation provided by law, passed in accordance herewith, *shall not be liable to respond in damages at common law or by statute* for such death, injuries, or occupational disease. * * *" (Italics ours.)

The above constitutional provision was included in an amendment which became effective January 1, 1924.

The Ohio General Code, Section 1465-70, which has been a part of the Workmen's Compensation Act since 1913, provides:

> "*Employers who comply* with the provisions of the last preceding section *shall not be liable to respond in damages at common law or by statute,* save as hereinafter provided, for injury or death of any employe, wherever occurring, during the period covered by such premium so paid into the state insurance fund, or during the interval of time in which such employer is permitted to pay such compensation direct to his injured or the dependents of his killed employes as herein provided." (Italics ours.)

By amendment to the Workmen's Compensation Act, effective August 5, 1921, specific provision was made for compensation for fifteen enumerated occupational diseases. By further amendment, effective July 21, 1929, the number of compensable occupational diseases was increased to eighteen; and by amendment effective July 18, 1931, the number was increased to twenty-one. Effective July 31, 1937, another amendment to the Workmen's Compensation Act added silicosis as a compensable occupational disease, thereby increasing the number to twenty-two.

The schedule of compensable occupational diseases has never at any time included, and does not now include, any

of the diseases enumerated and complained of in the amended petition, except that silicosis is now included as above stated.

It should, however, be observed that the plaintiff does not pretend that the amendment of 1937, adding silicosis as a compensable occupational disease, has any bearing on this case (Typewritten brief of petitioner in support of petition for *certiorari*, p. 17). The petitioner there says:

> "The amendment to the Ohio statutes has absolutely nothing to do with the case at bar. * * *"

It is conceded in the petition (R. 2-3) that the defendant has complied with the Workmen's Compensation Act of Ohio both with respect to industrial accidents and occupational diseases. At the time the judgment of the District Court was rendered for the defendant, it was therefore entitled to immunity from actions at law.

The decisions of the Ohio Supreme Court on the question of liability for occupational disease are both numerous and consistent. We refer the court to the early case of *Industrial Commission of Ohio vs. Brown*, 92 O. S. 309 (1915). This was a lead poisoning case. In the opinion, the court quoted with approval that portion of the opinion of the Supreme Court of Michigan in *Adams vs. Acme White Lead & Color Works*, 182 Mich. 157, 148 N. W. 485 (1914), in which the Michigan court held that an employee had no right of action at common law for injury or death due to occupational disease.

The next important decision of the Ohio Supreme Court was *Zajachuck vs. Willard Storage Battery Co.*, 106 O. S. 538 (1922). In that case, the plaintiff had alleged that the defendant was negligent (as in the case at bar), but the court held that under the Ohio law there could be no recovery. The court said:

> "* * * An examination of the organic and state law discloses that whatever right of action thereto-for existed, if any existed, either at common law or under the statutes, for damages resulting from occupational diseases, after passage of the workmen's compensation law employers who had complied therewith were exempt from liability therefor. * * *"
>
> 106 O. S. at 540.

In the next case, *Industrial Commission of Ohio vs. Monroe*, 111 O. S. 812, 813-14 (1924), the court said:

> "It is not for this court to pass upon the wisdom or reasons for denying such privilege. *At common law there was no liability for damages for occupational diseases,* but by statute, * * * the legislature has classified in 15 different divisions diseases occupational in character that are compensable, and in granting this right it by the same act denies the privilege of appeal. * * *" (Italics ours.)

The next case was *Maxwell Motor Corp. vs. Winter*, 118 O. S. 622 (1928). This case was unique in that it allowed the plaintiff to recover for lead poisoning contracted in 1923, at which time a particular statute was in effect, recovery being allowed only because of the effectiveness of that particular statute at that time. That statute was *Ohio General Code, Sec. 1465-76*, which was repealed by implication by the Constitutional Amendment of January 1, 1924 (so held in *Mabley & Carew Co. vs. Lee*, 129 O. S. 69, 73 (1984)). That section, however, was expressly repealed by the legislature by Act effective July 9, 1931.

The right to recover, which was upheld under that section, thus existed only between August 5, 1921, when certain occupational diseases were made compensable, and January 1, 1924, when the constitution of Ohio was amended. The right that existed during that short interval was created by the legislature; and the Supreme Court of Ohio recognized it as a newly created right, the court saying in its opinion:

> "This was the creation of a right not theretofore existing and the intent of the legislature to create the same is clear and manifest. * * * a new right to recover was created."
>
> 118 O. S. at 629.

The most recent decision of the Ohio Supreme Court on the subject was *Mabley & Carew Co. vs. Lee*, 129 O. S. 69 (1934). Action was there brought against a department store, which was plaintiff's employer, for damages to her health, allegedly due to being required to work long hours, in violation of the statutes of Ohio with respect to the employment of minors. The defendant there was alleged to have been negligent, as in the case at bar. The defendant filed a demurrer to the petition, which was sustained, the court saying:

> "* * * The single question decisive of this case is whether the present provisions of Article II, Section 35" (of the Constitution of Ohio) "permit this sort of action against an employer who is a contributor to the state fund."
>
> 129 O. S. at 74.

After an exhaustive comparison of the provisions of *Article II, Section 35*, as adopted in 1923, effective January 1, 1924, which is the present form of *Article II, Section 35 of the Ohio Constitution*, and the same section as it became effective January 1, 1913, the Ohio Supreme Court affirmed the lower court and sustained the demurrer to the petition, saying:

> "From all of the foregoing, it is readily apparent that the present amendment provides a new and comprehensive definition of the rights and liabilities of employers and employees. Under it certain new rights were created and some former ones were abolished. * * *"
>
> 129 O. S. at 75.

After the decision of the Court in the *Mabley & Carew Company* case, the law of the state was deemed so well settled that the Supreme Court did not even consider the following cases involving the same question and dismissed them without opinion.

Fritz vs. Westinghouse Electric & Mfg. Co., 130 O. S. 156 (1935);
Mozingo vs. Marion Steam Shovel Co., 130 O. S. 591 (1936);
Riffee vs. Marion Steam Shovel Co., 133 O. S. 109 (December 1937);
Brammer vs. Alloy Cast Steel Co., 133 O. S. 117 (December 1937);
Noggle vs. Alloy Cast Steel Co., 133 O. S. 118 (December 1937).

In the last five cases, the *Fritz, Mozengo, Riffee, Brammer* and *Noggle* cases, Messrs. Smith & Sutherland, counsel for the present petitioner, were counsel for the unsuccessful plaintiff-appellants. They thus made repeated but unsuccessful efforts to maintain actions in the Ohio courts to recover damages for occupational disease.

In another connection we shall refer to and comment on the cases of *Fritz vs. Westinghouse Electric and Mfg. Co.* and *Mozingo vs. Marion Steam Shovel Co.*, and we therefore do not discuss them at this point.

Suffice it to say, that these cases make it abundantly clear that at the time the judgment of the District Court was rendered, no law was better settled than the law of Ohio to the effect that there is no common law right of recovery for occupational disease; that the rights of an employee for recovery with respect to occupational diseases are only those which are given by the Workmen's Compensation Act; and that an employer, who has complied with the Workmen's Compensation Act, cannot be sued by reason of the employee's having contracted an occupational disease, even though the employee is not en-

titled to compensation under the Workmen's Compensation Act for that particular disease, and even though, as in the case at bar, the employee's claim be based on the alleged negligence of the employer.

In passing, it should be observed that Ohio did not stand alone in so holding with respect to recovery for occupational disease. In at least four other states the law is in accord with the law of Ohio at the time the judgment of the District Court was rendered.

Connecticut—*Miller vs. American Steel & Wire Co.*, 90 Conn. 349, 97 Atl. 345 (1916).

Illinois—*McCreery vs. Libbey-Owens-Ford Glass Co.*, 363 Ill. 321, 2 N. E. (2d) 290 (1936); *Vogel vs. Johns-Manville Products Corp.*, 363 Ill. 473, 2 N. E. (2d) 716 (1936).

Michigan—*Adams vs. Acme White Lead & Color Works*, 182 Mich. 157, 148 N. W. 485 (1914); *Thomas vs. Parker Rust Proof Co.*, 284 Mich. 260, 279 N. W. 504 (1938).

Texas—*Gordon vs. Travelers Ins. Co.*, 287 S. W. 911 (Court of Civil Appeals, 1926).

2. Ohio Law Subsequent to Docketing of Appeal in Circuit Court of Appeals.

Four and a half months after the appeal had been docketed in the Circuit Court of Appeals, the Supreme Court of Ohio in April 1939, in the consolidated case of *Triff vs. National Bronze & Aluminum Foundry Co.*, 135 O. S. 191, by a divided court of 4 to 3, overruled the cases of *Zajachuck vs. Willard Storage Battery Co.* and *Mabley & Carew Co. vs. Lee*, both *supra*, and swept away what had been the Ohio law for more than a quarter of a century as set forth in the foregoing authorities. In the consolidated

Triff case, the court held on demurrer that despite the Constitution and Workmen's Compensation Act of Ohio, as set forth p. 5 *supra*, there is a common law right recovery for non-compensable occupational diseases suffered by an employee as a result of the employer's negligence.

With respect to the *Triff* case, several important observations should be made:

(1) That decision was announced after an election had been held in the State of Ohio, which resulted in a change in the personnel of the Supreme Court of Ohio, Certain judges, who were on the court when the *Mabley & Carew Co., Fritz, Mozingo, Riffee, Brammer* and *Noggle* cases were decided or in which motions to certify were denied, were no longer on the court when the *Triff* case was decided; and one of the judges, who concurred in and in fact wrote the opinion of the bare majority of 4 to 3, had but recently become a member of that court.

(2) The *Triff* case, contrary to assertions of plaintiff, does not purport to decide whether the judgment there announced shall have retroactive effect or only prospective effect as to similar causes that might have been pending at the time the decision was announced. To be sure, the majority opinion does say, *135 O. S. at page 206*, that the Workmen's Compensation Act and Constitution of Ohio do not deny the right to maintain at common law an action growing out of a noncompensable occupational disease, and that when the Workmen's Compensation Act was first adopted in Ohio, an action for occupational disease or wrongful death therefrom could be maintained against an employer guilty of actionable negligence. But the majority opinion does not decide whether this determination as to the law of Ohio shall be retroactive with respect to pending suits or prior injuries.

Cf. *Okla. Cotton Ginner's Assn. vs. State,* 174 Okla. 243, 51 Pac. (2d) 327 with *Oklahoma Packing Co. vs. Okla. Gas & Electric Co.,* 309 U. S. 4 (1940),

and

Montana Horse Products Co. vs. Great Northern R. Co., 91 Mont. 194, 7 P. (2d) 919, *and Sunburst Oil & Ref. Co. vs. Great Northern R. Co.,* 91 Mont. 216 7 P. (2d) 927 with *Great Northern Railway Co. vs. Sunburst Oil & Ref. Co.,* 287 U. S. 358 (1932), (See 287 U. S. at p. 364).

(3) Contrary, likewise, to assertions of plaintiff, the *Triff* case is not a declaration by the Supreme Court of Ohio of a law which was presumed to have a

> "platonic or ideal existence before the act of declaration * * *"
>
> *Great Northern Railway Co. vs. Sunburst Oil & Refining Co.,* 287 U. S. 364.

The *Triff* case does not represent what might be termed a new pronouncement of old law or what had always been regarded as the law of the state in the absence of an actual decision to that effect. It is not merely a declaratory or clarifying decision. It expressly overrules both the *Zajachuck* and *Mabley & Carew Co.* cases, and thus announces an entirely new law for the State of Ohio directly contrary to what had been the law of that state for a quarter of a century. In order to reach the result which it did in the *Triff* case, it *was necessary* for the court expressly to overrule two of its own decisions which had settled the law of this state.

(4) The case of *Smith vs. Lau,* 135 O. S. 191 (Apr. 1939), which was part of the decision in the *Triff* case, was, like the *Triff* case, decided on demurrer. It is still pending

in the courts of Ohio and has not yet been tried in the Court of Common Pleas, to which it was remanded.

See *State ex rel. Smith vs. Young, Judge,* 137 O. S. 319 (October 9, 1940).

In that case, Messrs. Smith and Sutherland for their client, the plaintiff in the case of *Smith vs. Lau,* after innumerable pleadings, motions, proceedings and appeals, brought a mandamus action in the Supreme Court to compel the District Judge, to whom the Supreme Court in *Smith vs. Lau* had remanded the case, to enter judgment for the plaintiff. The case is thus still subject to a determination of the rights of the plaintiff therein and the employer as to the latter's liability at common law for a non-compensable occupational disease. The case may still be appealed to the Supreme Court and the original judgment on demurrer overruled.

(5) Since the decision of the Ohio Supreme Court in the *Triff* case, there has been *another* election in the State of Ohio resulting in the election of two new judges to the Ohio Supreme Court and the failure to obtain re-election of one of the judges who concurred in the bare majority opinion in that case. In view of the fact that the personnel of the Ohio Supreme Court has changed since its decision in the *Triff* case, and since the case of *Smith vs. Lau* is still pending and may again be brought to the Supreme Court of Ohio, it cannot be said either as a matter of law or fact that the *Triff* case has finally determined the law of the State of Ohio on the question there decided.

The situation is this. One of the judges, who concurred in the bare majority opinion of 4 to 3 in the *Triff* case, is no longer a member of the court. One of the judges, who wrote a vigorous dissenting opinion in the case, has since died. His place has been taken by a new judge recently elected in the November, 1940, election; and

a second new judge has been elected to the court. There is probably no doubt but what the three judges, who remain of the majority in the *Triff* case, will adhere to that opinion. There is likewise no doubt but what the Chief Justice and Judge Mathias, who wrote vigorous, separate dissenting opinions in the case, will adhere to their opinions.

What the two new judges of the court will do with respect to the *Triff* case when they take their place on the bench the first of next year is purely a matter of conjecture. It is certainly very likely that they will be as persuaded by the cogent dissenting opinions to join in the overruling of the *Triff* case as they would be to adhere to that case when the question arises.

Attention is called to the personnel of the court, and stress is placed thereon because of its similarity to the situation before the court in *Board of Councilmen vs. Deposit Bank,* 124 Fed. 18 (C. C. A. 6th, 1903), which we shall discuss below, and because of the vital bearing of both that case and this situation on the problem before the court in the case at bar.

(6) The Ohio law at the time judgment was rendered by the District Court in the instant case was not the common law of Ohio. It was the constitutional and statutory law of Ohio as construed by the supreme court of that state in interpreting *Article II, Section 35 of the Constitution* and *Section 1465-70 of the General Code of Ohio* (Workmen's Compensation Act). The *Triff* case likewise deals with the same sections of the Ohio Constitution and Workmen's Compensation Act. It is a common law decision only in that it denies that those constitutional and statutory provisions bar a common law right of recovery and because it holds that there is such a common law right of recovery. We advert to this fact, that the law of

Ohio at the time the judgment in the District Court was rendered was not the common law of Ohio because of its bearing on the application of *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64 (1938), to the problem before the court.

C.

ISSUES OR QUESTIONS PRESENTED

Only two questions are presented in the petition for *certiorari* (typewritten petition for *certiorari*, page 2):

(1) Whether or not the Circuit Court of Appeals was bound to reverse the judgment of the District Court, which was right when it was rendered, simply because of the intervening overruling of the Ohio law by the highest court of the state; and

(2) Whether, if the Ohio law at the time of judgment controls so as to bar plaintiff from any remedy for her alleged injury, plaintiff has been denied rights under the Fourteenth Amendment of the Constitution of the United States.

More precisely, the main question may be stated as it was by the court below, 110 F. (2d) at p. 312, (R. 15):

> "Whether a judgment of a federal court *in a diversity of citizenship case,* right when entered, must be set aside because of a new pronouncement by the court of last resort of the state in the construction of a state statute, * * *." (Italics ours.)

The question, which is thus presented, must not be confused with other situations, among which is the analogous issue

> "calling for the application of the rule governing decision of a case involving state law at the time it first reaches a federal reviewing court, or the rule governing decision of cases involving federal law by reviewing courts thus unfettered by Section 34 of the Judiciary Act." *110 F. (2d) at p. 313.* (R. 16.)

D.

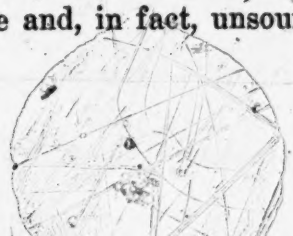
SUMMARY OF ARGUMENT

We shall show that the judgment of the Circuit Court of Appeals was correct on both reason and authority in holding that the judgment of a federal court in a diversity of citizenship case which, under the mandate of Section 34 of the Judiciary Act of 1789, applied the law of Ohio should not be reversed on appeal because of a subsequent change in the state law. We shall discuss the following points:

(1) For more than eighty years this court has adhered to the rule that the judgment of a federal court in a diversity of citizenship case, which was right at the time of its rendition because it applied the state law, should not be reversed because of a subsequent change of that law. In developing this point, we shall discuss the numerous authorities relied upon both by the plaintiff and the defendant, and we shall likewise discuss the general problem of the effect of a change of law on appeal from a judgment which was right at the time of its rendition.

(2) The case of *Erie Railroad Co. vs. Tompkins,* 304 U. S. 64 (1938), does not cast doubt upon the foregoing principle adhered to by this court but in fact fortifies the conclusion of the Circuit Court of Appeals. The *Erie* case lends support to the authorities on which we rely and which have been law in this court for more than eighty years.

(3) We shall point out that if the court has any doubt as to the legal soundness of the rule we advocate and the conclusion reached by the Circuit Court of Appeals, numerous practical considerations render it both inexpedient and unwise and, in fact, unsound to reconsider or change that rule.



(4) Section 34 of the Judiciary Act of 1789 is a limitation on the power of the federal judiciary derived from Article III of the Constitution of the United States. It compels the district courts to adopt the laws of the several states as rules of decision only in *trials at common law.* It does not apply to appeals in federal reviewing courts in diversity of citizenship cases. An appeal is not guaranteed by the federal constitution or statutes. This is particularly true of an appeal in *forma pauperis.* Consequently, when the District Court has followed the mandate of Section 34 of the Judiciary Act, that section loses its propelling force and ceases to have any application so far as the rights of litigants in the District Court are concerned.

(5) If the view of the plaintiff were adopted, that a change of state law requires a federal appellate court case to reverse a judgment which was right at the time of its rendition, and to apply the later state law, the party obtaining the benefit of the judgment in the federal court would be deprived of the right to assert in this court federal objections to the later state law. Consequently, the later state law is not binding on a judgment of the federal courts pending appeal.

(6) If this court should conclude that the Circuit Court of Appeals has judicial power to reverse a federal judgement in view of a change of state law, this court should nevertheless hold that *it is not incumbent* upon the court to do so. Even though a federal reviewing court might in its discretion follow the subsequently announced state law, it need not do so with respect to a judgment which was correct when entered.

(7) The case of *Triff vs. National Bronze & Aluminum Foundry Co.* is not the settled law of Ohio within the mandate of *Section 34 of the Judiciary Act of 1789.*

(8) The decision of this court in *Erie Railroad Co. vs. Tompkins* rests upon the determination of a constitutional

question, that Section 34 of the Judiciary Act of 1789 is merely declaratory of the judicial power of the federal courts conferred upon them by Article III of the Constitution, and that it is not a limitation on the Judicial power thereby conferred. We shall point out that even if this be true, it has no bearing upon the question involved in the instant case.

But if the court should be of the opinion that the constitutional question in the *Erie* case affects the issue involved in the case at bar, we shall point out, first that the question thus "decided" was *dictum* and unnecessary to the decision; second, that it was erroneous, and, third, that it should be repudiated in view of the clear and unequivocal import of Article III of the Constitution and the plenary nature of the judicial power thereby conferred.

(9) Finally, we shall briefly discuss the constitutional question raised by plaintiff, *viz.*, that the Ohio law, as it existed at the time of the judgment of the District Court, deprives plaintiff of certain rights under the Fourteenth Amendment of the Constitution of the United States.

E.

LAW AND ARGUMENT

I. Decisions of This Court Uniformly Support Defendant's Contention.

The controlling factors in the instant case are the following four:

1. Construction of Section 34 of the Judiciary Act of 1789, 28 U. S. C. A., Sec. 725;
2. The fact that we are dealing with a coordinate system of courts in a federal system of government;
3. The fact that the consolidated case of *Triff vs. National Bronze & Aluminum Foundry Co.*, 135 O. S. 191, is not a declaratory or clarifying decision but an overruling decision. It does not represent a mere

announcement of state law that is thought to have had some eternal, platonic, ideal existence, but constitutes a distinct change of the law of Ohio and the overruling of a quarter of a century of settled law in that state;

4. The further fact that this case involves the substantive rights of litigants and not mere questions of procedure, practice or remedy.

These four vital factors and controlling elements must be borne in mind in disposing of the case at bar.

Section 34 of the Judiciary Act, 28 U. S. C. A. Sec. 725, requires the federal courts "except where the Constitution, treaties or statutes of the United States shall otherwise require or provide" to regard "the laws of the several states" "as rules of decision *in trials at common law* * * * in cases where they apply." (Italics ours.)

In *Erie Railroad Co. vs. Tompkins,* 304 U. S. 64, this court held, in overruling *Swift vs. Tyson,* 16 Pet. 1 (1842), that the federal courts must follow this mandate of the Judiciary Act in all matters of state law.

In accordance with the mandate of the Judiciary Act, the District Court for the Northern District of Ohio did in the instant case apply the law of Ohio as its rule of decision in rendering judgment for the defendant. The question, therefore, presented is whether the overruling of the Ohio law four and a half months after the appeal was docketed can or should have a retroactive effect on the judgment of the federal district court so as to require a reversal thereof and make that erroneous which was not so when entered.

The decisions of this court have uniformly answered this question in the negative.

Concordia Insurance Co. vs. School District, 282 U. S. 545 (1931);

Milwaukee E. R. & L. Co. vs. Wisconsin ex rel. Milwaukee, 252 U. S. 100 (1920);

Roberts vs. Northern Pacific Ry. Co., 158 U. S. 1 (1895);
Morgan vs. Curtenius, 20 How. 1 (1859).

Accord:

Northrup vs. Columbian Lumber Co., 186 Fed. 770 (C. C. A. 5th, 1911);
Westinghouse Air Brake Co. vs. Kansas City Southern Railway Co., 137 Fed. 26 (C. C. A. 8th, 1905);
Board of Councilmen of City of Frankfort vs. Deposit Bank of Frankfort, 124 Fed. 18 (C. C. A. 6th, 1903).

Cf. *Chicot County Drainage District vs. Baxter State Bank*, 308 U. S. 371 (1940).

In the *Concordia Insurance Co.* case, the court dealt with an Oklahoma statute with regard to the payment of interest on a judgment against an insurance company. The respondent asserted that the Oklahoma decisions construing the statute at the time of the judgment of the federal District Court were contrary to the claims of the petitioner. The petitioner, however, contended that after the judgment of the District Court and while the case was pending on appeal, the Oklahoma Supreme Court had settled the construction of the statute in favor of petitioner. With respect to that contention, this court said:

> "* * * But that inquiry may be put aside since the decision was handed down * * * more than a year after the present judgment had been entered by the federal District Court, and *whatever may be the prospective effect of this last decision it cannot be given a retroactive effect in respect of the judgment of the federal District Court so as to 'make that erroneous which was not so when the judgment of that court was given'.*" *282 U. S., pp. 553, 554.* (Italics ours.)

In *Milwaukee E. R. & L. Co. vs. Wisconsin ex rel. Milwaukee,** a city ordinance was involved. It was claimed by the petitioner that the interpretation given to the ordinance by the State Supreme Court had been changed by the state court after the case had reached this court on writ of error, and that the subsequent decision construing the ordinance should control the judgment rendered against the petitioner in the court below. With respect to that contention, the court, speaking through Mr. Justice Brandeis, said:

> "* * * the 14th Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions, * * * the *company seeks here to base rights on a later decision between strangers, which, it alleges, is irreconcilable on a matter of law with a decision theretofore rendered against it. The contention is clearly unsound.*" 252 U. S. at 106. (Italics ours.)

In *Roberts vs. Northern Pacific Ry. Co.*, the court dealt with the validity of a conveyance of land by a county to the railroad. The State Supreme Court had originally upheld the power of a county to make such a conveyance. After the suit was tried in the federal court, the State Supreme Court held that the conveyance was invalid. On the basis of the later state decision, the defendant sought to file a supplemental answer setting up the change of state law much in the manner of the attempt of the plaintiff in this case to file a supplemental brief in the Circuit Court of Appeals setting up the overruling of the Ohio law.

With respect both to the right of the defendant there to file the supplemental answer and the effect of the subsequent overruling decision on the validity of the federal Circuit Court judgment, this court said on page 26 of *158 U. S.*:

> "Error could scarcely be imputed to a court for refusing to allow an amendment or supplement to an

* This is not a diversity of citizenship case; but what was said by the court is applicable to the case at bar.

answer after the case had progressed to a final hearing, nor to its judgment in disregarding the allegations of such proposed amendment. But, waiving that suggestion, and regarding the matter set up in the supplementary as if it had been alleged in the original answer, we are unable to see that the decree of the court below ought to have been affected by anything so alleged.

"* * * While it may be conceded that the decision rendered in the state court was decisive as between Ellis and the railroad company as to the title to the lots there in question, yet *the Circuit Court of the United States,* whose jurisdiction had been invoked as to other pieces of land, *and with other parties involved, could not be expected to suspend its action, or to adopt a conclusion of the state court reached after the case had been submitted on final hearing* in the former court." (Italics ours.)

In *Morgan vs. Curtenius,* the court dealt with two deeds from the same grantor. The effect of the first deed depended upon a construction of a statute of the State of Illinois. The federal Circuit Court adopted the construction of the statute which had been settled by the Supreme Court of Illinois for some years prior to the entry of the federal judgment. With respect to the judgment of the federal court, which construed the statute in accordance with the law of Illinois as it had then been determined by the Supreme Court of the state, this court said, *20 How. at page 3*:

"* * * This construction of the statute was, therefore, a settled rule of property at the time of the decision of this case in the court below, which that court was bound to follow; and having so decided, there was certainly no error in the decision at the time it was made."

After the federal judgment was rendered, the Illinois Supreme Court overruled its earlier decision and construed the statute in a manner which would vitally affect the valid-

ity or priority of the first deed. This court conceded that the same conveyance and the same statute were involved in the overruling decision, and were given a construction contrary to that which had previously governed such conveyances in Illinois. Then the court dealt with the effect of the overruling decision on the federal judgment, and said:

> "If the judgment of the Circuit Court in this case had been given since the last decision of the Supreme Court of Illinois, this court might have been compelled to decide whether they considered themselves bound to follow the last decision of that court, or at liberty to choose between them. But, *however the latter decision may have a retroactive effect upon the titles held under the deed in question, it cannot have that effect upon the decisions of the Circuit Court, and make that erroneous which was not so when the judgment of that court was given.*" *P. 3 of 20 How.* (Italics ours.)

In *Pease vs. Peck,* 18 How. 595 (1856), the court dealt with the statute of limitations of Michigan. For a number of years the statute had received a certain interpretation from the Michigan and federal courts which was adverse to the defendant's case. The defendant, however, contended that as a result of the discovery of certain materials in the state archives, the State Supreme Court, after the rendition of the federal judgment, had construed the statute in a manner to support his defense and adversely to the contentions of the plaintiff. This court, however, affirmed the judgment of the lower court and held that the subsequent overruling construction of the statute by the State Supreme Court had no retroactive effect on the judgment of the federal court. On p. 598 *et seq.* of *18 How.*, the court said:

> "* * * In all cases where there is a settled construction of the laws of a state, by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry. * * * When the decisions of the state court are not

> consistent, we do not feel bound to follow the last, if it is contrary to our own convictions—and much more is this the case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent. Cases may exist, also, *when a cause is got up in a state court for the very purpose of anticipating our decision of a question known to be pending in this court.* Nor do we feel bound in any case in which a point is first raised in the courts of the United States, and has been decided in a circuit court, to reverse that decision contrary to our own convictions, in order to conform to a state decision made in the meantime. *Such decisions have not the character of established precedent declarative of the settled law of a state.*" (Italics ours.)

In *Northrop vs. Columbian Lumber Co.*, the Circuit Court of Appeals for the Fifth Circuit considered the law of Georgia as to whether the probate of a will in a foreign state could be proved in Georgia or whether the will itself had to be probated in Georgia in order to establish title to Georgia land. At the time the action in ejectment was filed, the decisions of the Georgia courts permitted proof of foreign probate and did not require probate in Georgia. After the suit was filed, the Georgia Supreme Court overruled its earlier decisions and held that a devisee under a will executed and probated in another state could not maintain a suit to recover adversely held land until the will had been probated in Georgia. With respect to this overruling decision, which would have affected the plaintiff's right to bring the action, the Circuit Court of Appeals said (186 Fed. at p. 782):

> "We are not considering the question whether *Chidsey vs. Brookes*" (the overruling decision) "announces a correct rule. We assume that it does. But it clearly changes an existing rule established by the Georgia Supreme Court on which the plaintiff

> relied when he brought his suit. If the rule announced in the last case presented a barrier to his rights which the plaintiff had previously asserted, we would, under the circumstances, be reluctant to hold that it should be held applicable to this case."

In *Westinghouse Air Brake Co. vs. Kansas City Southern Ry. Co.*, the Circuit Court of Appeals for the Eighth Circuit dealt with the construction of a Missouri statute by the Missouri Supreme Court. In 1880, the Supreme Court of Missouri held that under the statute, a contracting company, which furnished materials to a railroad company outside of the state, was entitled to a lien upon the company's property within the State. Subsequently, the Westinghouse Company furnished materials to the railway outside of Missouri and perfected its lien on the railroad's property in Missouri in accordance with the statute. In 1899, the Westinghouse Company intervened in a foreclosure suit asking that its lien be adjudged a preferred claim.

In 1904, while the foreclosure suit was pending on appeal, the Supreme Court of Missouri overruled its earlier decision and held that one, who furnishes materials to a railroad outside of the State, is not entitled to a lien upon the railroad's property within the state. The railroad contended that the Circuit Court of Appeals was bound to follow this overruling decision and to deny a statutory lien to the Westinghouse Company. The Circuit Court of Appeals, however, refused to follow the overruling decision, and said with respect to it (p. 35 of 137 Fed.):

> "* * * The law declared by both the legislative and judicial departments of the state of Missouri invited the petitioner, a citizen of another state, to make its agreement and to acquire its lien, and it may not now be lawfully deprived of its contract rights or of its statutory lien because the highest judicial tribunal of the state has changed the law

> after the event and after its rights were vested. *An ex post facto change of the law by construction is as vicious as by legislation.*" (Italics ours.)

Undoubtedly, the most persuasive in its reasoning of any of the above cases is *Board of Councilmen of City of Frankfort vs. Deposit Bank of Frankfort,* 124 Fed. 18, decided by the Circuit Court of Appeals for the Sixth Circuit. To be sure, the case is distinguishable from the above cases and the instant one in that it involved a bill of review rather than a straight appeal. However, the court made no point of this distinction and its language is equally applicable to a straight appeal.

The case involved a suit by the Bank to enjoin the collection of a tax. The federal court enjoined the collection of the tax on the ground that the highest court of Kentucky had held the statute, under which the tax was imposed, unconstitutional. After the judgment of the federal court, the Kentucky court overruled itself by a divided court and by a bare majority of one, and held the statute constitutional. It was, therefore, contended by the councilmen that this subsequent decision of the Kentucky court was binding upon the federal court and that therefore the judgment should be reversed.

The Circuit Court of Appeals was rather impatient with this contention, and pointed out that the overruling decision of the Kentucky Court was the result of a change in personnel of the court (*even as in the instant case*) and by a bare majority at that; and the court therefore refused to follow the subsequent overruling decision of the State Court. On *pages 24 to 25 of 124 Fed.*, the court gives its reasons for refusing to follow the overruling decision:

> "* * * After the decree of the United States court in question, the membership of the Kentucky Court of Appeals was changed, and, the question being again brought up, that court overruled its former

decision by a bare majority, and, on the Fayette circuit judgment being brought up, it was reversed. *We do not think it can be admitted that the final judgments of the courts of one jurisdiction can be thus made dependent upon the changing views of the courts of another.* In the present case the ultimate and controlling fact relied upon is that the Kentucky Court of Appeals has swept away the foundation on which the former decree of the United States court was decided; for it was the inevitable result of the new law of the state, as declared by its Court of Appeals, that the Fayette circuit court judgment should be reversed. *Suppose the United States court should reverse its decree, and the state court should again change its views and revert to its former opinion; shall the United States court restore its decree? The principles upon which the finality of judgments rests preclude such consequences.* * * * * * *To hold otherwise would leave the judgments and decrees of the courts on very unstable foundations, and dependent, not upon their own rectitude, but upon the vicissitudes of shifting opinions in regard to the governing law.* * * *" (Italics ours.)

The court then compared the situation before it with the case of *Burgess vs. Seligman,* 107 U. S. 20, which we shall discuss in another connection; and the court says, as the following quotation on *page 25* of the opinion indicates, that the case before it was a much stronger one for upholding the order of the lower court than was presented in the *Burgess* case:

"* * * Yet such an application" (that is, an application to the District Court in the *Burgess* case to reverse its judgment upon the ground that the law of Missouri had been declared contrary to what it was construed to be by the Circuit Court when it rendered its judgment) "would have stood in one respect on better ground than the present, for there the statute had never received a construction by the Supreme Court of the State. We do not lose sight of the fact that there was an actual reversal of the judgment of the Fayette circuit court; but, as we

> have said, that was the necessary consequence of the change in the law upon which it rested. Suppose, again, that in the present case the courts of the United States had founded their judgment directly upon some statute of the state, holding it to be a valid law. The sanction of such a law would be of equal force at least with the estoppel upon which it did found it. Would the decree be reopened and reversed upon a showing that the statute had been since then held invalid by the highest court of the state? We do not think so. * * *"

It is important to observe that the above authorities are the only cases in this court and the Circuit Courts of Appeals which deal *squarely* with the problem now before the court. All those authorities uniformly hold that when a lower federal court applies the law of the state as the rule of decision in accordance with the mandate of *Section 34 of the Judiciary Act*, its judgment will not be reversed because of a subsequent change of the law of the state as determined by its highest tribunal in overruling earlier decisions.

We say that the above authorities are the only ones which so hold. As a matter of fact, there are several what may be designated municipal bond cases which are also in accord. Among these we call the court's attention to such cases as *Township of Roberts vs. Bolles*, 101 U. S. 119 (1880). But we do not rely on these municipal bond cases. It might be contended that they are distinguishable for the reason that they involved negotiable instruments and that this court might have carried into them the now obsolete concept of general law because of their subject matter.

With respect, however, to such municipal bond cases, and likewise to the situation presented by the instant case, we wish to point out that neither of these classes of cases has any relation to cases of the type of *Gelpcke vs. Dubuque*, 1 Wall. 175 (1864), which this court has recently

disaparaged as a "juristic sport" (*Oklahoma Packing Co. vs. Oklahoma G. & E. Co.*, U. S. Supreme Court, December 4, 1939, 84 L. ed. 194, opinion withdrawn.)

Gelpcke vs. Dubuque is based entirely upon the accrual of rights under a particular line of state decisions which were overruled *prior* to the filing of suit or the entry of judgment in the federal court. In other words, the federal courts in such cases, in disregard of the Rules of Decision Act simply refused to follow the overruling decisions of the state courts which were rendered prior either to the filing of suit or to the rendition of judgment. Such decisions do not involve the application of *Section 34 of the Judiciary Act*, and of course are distinguishable from the problem in the instant case.

Similarly, we call the court's attention to a number of decisions both before and after the case of *Erie Railroad Co. vs. Tompkins*, which it might be thought are out of harmony with the cited authorities which we say uniformly support the defendant's position. Such cases are:

Oklahoma Packing Co. vs. Oklahoma G. & E. Co., 309 U. S. 4 (1940);

Wichita Royalty Co. vs. City National Bank of Wichita Falls, 303 U. S. 103 (1939);

Michalek vs. U. S. Gypsum Co., 298 U. S. 639 (1936);

Marine National Exchange Bank vs. Kalt-Zimmers Mfg. Co., 293 U. S. 357 (1934);

Sioux County vs. National Surety Co., 276 U. S. 238 (1928);

Chicago, M. St. P. & Pac. Railroad Co. vs. Risty, 276 U. S. 567 (1928).

These cases do not touch the problem involved in the instant case.

In the *Oklahoma Packing Co.* case, the court considered the effect of an Oklahoma Supreme Court decision rendered

prior to the entry of the decree by the federal District Court. In regard to the Oklahoma decision, this court said in the opinion which it subsequently withdrew:

> "The state court, as we have already indicated, did not go back on its past; it merely clarified what it had done."

The case is thus distinguishable from the instant case for two reasons. First, it deals with a state decision which antedated the federal judgment or decree, and second, it deals with the effect of a *clarifying* and not an overruling state decision on a federal judgment.*

On application for rehearing, the attention of this court was called to the fact that the Supreme Court of Oklahoma in a subsequent decision had declared that even its clarifying decision should not be given retroactive effect. This court, therefore, withdrew its former opinion in which it had given retroactive effect to the first clarifying decisions, and then followed the second clarifying decision which held that the first decision should not have retroactive operation.

In the *Wichita Royalty Co.* case, it does not appear in the opinion whether the federal District Court had followed the state law in accord with Section 34 of the Judiciary Act. What does appear is that the Circuit Court of Appeals deliberately refused to follow the state law as announced by the highest court of Texas because the Circuit Court of Appeals thought it was free to disregard it under the doctrine of *Swift vs. Tyson.*

For all that appears in the opinion of this court, the District Court probably did apply the law of the state as determined by the Supreme Court of Texas. It was only

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* We shall hereafter employ the term "clarifying" or "declaratory" decision as a pronouncement of law by a state court on a question which had not been previously settled by the court. It thus represents the decision of the court either on a matter of first impression or when the prior decisions of the court dealing with the question have not satisfactorily settled the law.

on rehearing and after this court had decided *Erie Railroad Co. vs. Tompkins* that the Circuit Court of Appeals sought to rationalize its disregard of the state law by saying that the state law had actually been modified and that it was following the state law as so modified.

When this court determined that the state law had not been modified, there was, of course, nothing to do but to disapprove the decision of the Circuit Court of Appeals on that point. In other words, the question there was *not* whether a judgment of the District Court, which was correct in applying the law of the state, should be reversed when the state law was changed.

The *Michalek* case (relied upon by plaintiff) likewise does not reach the instant problem. The court there did not deal with an overruling state decision subsequent to the federal judgment. In the Circuit Court of Appeals, Judge Hand vigorously dissented from the judgment on the ground that the federal court was failing to apply the state law. After that judgment, the New York Court of Appeals rendered a decision directly in accord with the dissenting opinion of Judge Hand.

The New York Court of Appeals made it quite clear that it was not overruling pre-existing state law, but on the contrary was simply deciding in accordance with the law of the state as it had been settled for years past. Hence this court, in reversing the judgment of the Circuit Court of Appeals, cited the later decision of the New York Court of Appeals and simply held that the lower federal court must apply the law of the state in accordance with Section 34 of the Judiciary Act. There was no question of a change of state law, as is perfectly clear both from the dissenting opinion of Judge Hand in the Circuit Court of Appeals and from the decision of the New York Court of Appeals which this court cited.

In the *Marine National Exchange Bank* case, the question was whether a bank was a holder in due course of certain bonds. That question turned on the construction of the Negotiable Instruments Law of Wisconsin. The Wisconsin Supreme Court, prior to the suit in the federal court, had held with respect to similar bonds that a bank situated like the bank in that case was a holder in due course. The Circuit Court of Appeals refused to follow the Wisconsin decision on the ground that the Wisconsin decision was based upon a construction of the Negotiable Instruments Law of the state which was merely declaratory of general commercial law.

This court, of course, held that the federal court was bound to follow the interpretation of the Negotiable Instruments Law by the state court even though the law were merely declaratory of general commercial law. There was no question of a change of state law nor even of a decision of the state court rendered after the judgment in the federal court. The main contention of the respondent in that case was that the state court decision should not be followed because it was rendered after the issuance and pledge of the bonds in question. The respondent apparently sought to analogize the situation then before the court to that involved in *Gelpcke vs. Dubuque.*

Sioux City vs. National Surety Co. likewise does not touch the instant problem. The federal District Court had correctly applied the state law as determined by the state Supreme Court from a construction of a state statute concerning the liability of a surety company for a deposit of county funds. The Circuit Court of Appeals reversed the judgment and held that the statute, as construed by the Nebraska court, limited the surety's liability to one-half of the bank's capital. This court held that the Circuit Court of Appeals had misconstrued the statute and was in conflict with a decision of the Nebraska court which was

rendered subsequently to the judgment of the Circuit Court of Appeals.

There, again the District Court had correctly applied the state law and the decision of the Nebraska Supreme Court rendered after the judgment of the Circuit Court of Appeals was not an overruling decision but simply a clarifying decision in the same manner as in the decision of the New York Court of Appeals involved in the *Michalek* case, *supra.*

In *Chicago, M. St. P. & P. Railroad vs. Risty,* likewise, no subsequent overruling decision of a state court was involved. The case had been before this Court on a former appeal, and this Court had construed the state assessment statutes in accord with what it thought was the state law. Subsequently, the Supreme Court of South Dakota construed the statutes in a different manner. That was before the second suit was filed in the federal court. This Court, of course, held that the federal courts were bound by the construction of the statutes by the State Supreme Court. The state court had not overruled any prior decisions, and there was no question of a changed state law.

Numerous other cases of similar import might be cited and discussed. But we have merely called the court's attention to the more recent decisions which might be thought analogous to the problem of the instant case. These cases deal solely with *clarifying* or *declaratory* state decisions; and in only one* of them (*Sioux County vs. Nat'l Surety*) was the state decision rendered after the federal judgment. They hold that a federal reviewing court may apply such intervening *clarifying* or *declaratory* decisions to a judgment of the lower court which was *apparently* right when rendered in the absence of such decisions but which be-

* In the *Michalek* case, the court did not follow or apply to the federal judgment a later state decision. It merely cited that later decision as authority for reversing the judgment which was wrong even in the absence of the later state decision.

comes erroneous in view of such clarifying or declaratory decisions.

There is no doubt that in several situations a reviewing court will follow a change of law or fact which occurs after the rendition of the judgment of a lower court correct at the time it was rendered. That such cases, however, do not involve the interpretation and application of *Section 34 of the Judiciary Act* will become clear from a review of these situations, which we believe it will be profitable to set forth. When such a change of law or fact occurs after the entry of a judgment, which is correct at the time of its rendition, the change may have a direct effect upon the judgment and may induce a reviewing court to consider the advisability or necessity of reversing it in view of such change of law or fact.

These changes may occur as the result of the enactment of a statute, a change in the factual situation or external conditions, and finally a decision of an ultimate reviewing tribunal. We shall take these up *seriatim*.

A. A Change of Law May Occur as the Result of the Enactment of a Statute So as to Bring Into Question the Validity of a Judgment Rendered by a Lower Court in the Absence of Such Statute.

1. The statute may be *noncommittal* as to the time and extent of its operation, that is to say, whether it is prospective or retrospective. It therefore becomes a question of interpretation whether it is retroactive so as to affect a pending appeal from a judgment which was correct when rendered in the absence of such statute. If the statute is noncommittal as to its period of operation, it will be construed prospectively (*Blodgett vs. Holden*, 275 U. S. 142 (1928), concurring opinion by Mr. Justice Holmes; *Shwab vs. Doyle*, 258 U. S. 529 (1922); cf. *Bucher*

vs. Cheshire Railroad Co., 125 U. S. 555 (188)) and will not affect the validity of a judgment rendered prior to its enactment.

2. Pending the appeal from a judgment of the lower court which was correct when it was rendered, a statute may be enacted which is *plainly prospective* in its operation. Of course, such a prospective statute will have no effect upon the judgment involved in the pending appeal.

Exceptional circumstances may, however, induce a reviewing court to apply even a prospective statute to a judgment pending an appeal even though the judgment were correct at the time it was rendered in the absence of such statute. Such a situation is presented in the case of *Crozier vs. Fried. Krupp Aktiengesellschaft*, 224 U. S. 290 (1912).

That case involved an equity suit to enjoin the infringement of patent rights and also for an accounting for damages for past infringement. More than a year after *certiorari* was granted by this court, Congress enacted a statute providing that when an invention covered by letters patent shall "*hereafer* be used by the United States without license," the patentee could obtain reasonable compensation in the Court of Claims. The statute being clearly prospective would have had no effect on the validity of the judgment if it had not been for the peculiar circumstances of the case and the fact that the patentee by means of a stipulation and the amendment of its bill had waived all relief for past infringements.

This court construed the statute as in effect granting the government the power of eminent domain over patent rights. Consequently, the remedy sought by the patentee for the future, namely, a permanent injunction, although perhaps proper at the time the bill was filed, became improper in view of the government's right to appropriate the patent by eminent domain under the statute. The

statute was therefore applied by this court not to the judgment of the lower court, but to the rights of the patentee. It was not a case of applying a prospective statute to rights of the patentee that had already accrued. It was simply a case of permitting the patentee to take advantage of the prospective operation of the statute since the patentee itself had waived all claims for past injury.

In a strict sense, the statute was not applied to the pending litigation. This court simply refused to enjoin the government for a tort in view of the fact that Congress had granted the patentee an alternative remedy for the infringement. The statute was held to begin to operate for the benefit of the patentee from the date of its enactment and not prior thereto; and the patentee was remitted by this court to his remedy in the court of claims under the statute. It is apparent, that both Judge Allen, in her dissenting opinion in the Circuit Court of Appeals, and the plaintiff completely misapprehend the significance of this case.

3. Pending an appeal from a judgment of a lower court, a statute may be enacted which is *plainly retroactive.* In some instances, it may even be said that the statute was enacted to affect a pending matter. Since such a statute is by its express terms retroactive and clearly applies to the matter involved in the pending appeal, and therefore affects the validity of the judgment of the lower court, a reviewing court must obviously apply the statute to the judgment of the lower court, and reverse it if it can legitimately do so. The only question which the reviewing court must then determine is whether the statute is valid retroactively. Numerous instances of the application of retroactive statutes to judgments pending on appeal may be cited. Many of them are cited and relied upon by the plaintiff in the instant case.

Perhaps the most recent of such cases is *Carpenter vs. Wabash Railway Co.*, 309 U. S. 23 (January 29, 1940), a

case which is strenuously urged upon this court to support the plaintiff's contention. An analysis of the case discloses that it has no bearing upon the instant problem.

The court was there dealing with an Act of Congress which expressly applied to proceedings in bankruptcy and equity receiverships

> "*now* * * * pending in any court of the United States."

The statute was an amendment of a bankruptcy statute and the amendment was passed after the judgment of the Circuit Court of Appeals was rendered. This court did not determine whether the judgments of the lower federal courts were correct at the time of their rendition, which was prior to the amendment in question. This court laconically stated that it assumed the judgments were correct when rendered.* The court then considered whether the statutory amendment required the reversal of the judgments of the lower courts.

Of course, the statute applied to those judgments since they were "proceedings *now* pending in courts of the United States." The court then had to determine whether the amendment, if applied retroactively, would be valid. On various grounds clearly set forth in the opinion, this court held that a retroactive application of the statute to a judgment pending on appeal was within the constitutional power of Congress.

The statutory amendment provided that claims for personal injuries should be preferred and paid out of the assets of the Railway Company as operating expenses. The petitioner, who claimed the benefit of the amendment, had long prior to the Wabash receivership in question obtained in the state court a judgment for damages for personal injury. The lower federal courts in an intervention proceeding re-

* The case in this court did not involve any diversity of citizenship questions. This court expressly ignored questions of state law.

fused to recognize this judgment for personal injuries as a preferred claim, but had allowed it as a general claim.

It thus appears that the rights of the parties were not involved as they had long since been determined by the Missouri state courts. *The sole question* involved in the case *was one of remedy and procedure, viz.,* the right of the petitioner to participate in the earnings of the railroad while it was in receivership and in the custody of the court.

Previous decisions of this court had held that such earnings were not exclusively the property of the mortgagees, but were subject to the payment of claims having superior equities, and that claims having such equities might be accorded priority in payment over the rights of the mortgagees even though they arose prior to the receivership. The court had further held that a reasonable classification of claims entitled to priority because of superior equities is subject to the determination of Congress in providing for the distribution of assets in bankruptcy proceedings. It was simply an exercise of the bankruptcy power of Congress. The fact that the amendment applied also to equity receiverships was held not to warrant a different conclusion with respect to the congressional power over the distribution of the assets of an insolvent.

The *Carpenter* case deals thus with a retroactive statute which clearly applied to the judgment pending on appeal. And the court held that such a retroactive amendment was within the constitutional power of Congress. The applicability of the statute was clear. Its validity was beyond doubt. The amendment involved no bestowal or conferring of new rights upon the litigants, but solely a determination of remedies under the doctrine of reasonable classification for such rights with respect to funds in the custody of the court.

The case of *United States vs. Schooner Peggy,* 1 Cranch 103 (1801), likewise involved the application of a retro-

active statute to pending litigation. It was a prize case and involved the application of a treaty or convention between the United States and France to the condemnation of the vessel in question. The convention provided that

> "'Property captured and *not yet definitely condemned* * * * shall be mutually restored.'"

The vessel, of course, was not yet definitely condemned inasmuch as it was still within the custody of the prize court; and there is language in the opinion to indicate that this court regarded the sentence of the Circuit Court as being interlocutory in nature. Clearly, the "statute" applied to the vessel; and the court held that the sentence of condemnation must therefore be reversed in view of the imperative effect of the convention or treaty which, under the Constitution, was a supreme law of the land.

It is interesting to mark what the court said about the retroactive application of the "statute":

> "The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the courts of the United States must be admitted. * * * But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of congress; * * *.
>
> "* * * It is true that *in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of the parties,* but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; *and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation.*" 1 C at 109-110. (Italics ours.)

The court thus made two important observations: first, that in private cases between individuals, a court

> "will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of the parties";

second, the court intimated that where a matter of national concern requires the parties to relinquish their vested rights, the parties may perhaps turn to the government itself for compensation. Here again we point out that the plaintiff has completely misapprehended the significance of the *Schooner Peggy* case in supposing that it applies to the instant controversy.

B. A Subsequent Event or Change in Conditions May Occur Which Is Not Directed at the Subject-Matter of the Litigation Involved in the Judgment of the Lower Court, but May Have a Direct or Indirect Effect on Such Judgment and the Subject-Matter of the Litigation.

These matters usually arise in connection with the exercise of jurisdiction by a court. *They do not and cannot affect the rights of the parties* to the litigation for the simple reason that they are not part of the subject matter of the litigation. Typical instances of such subsequent events or changes in conditions, which may affect a judgment which was right at the time of its rendition, are cases which become moot pending an appeal. Such was the case *of Barker Painting Co. vs. Local No. 734,* 281 U. S. 462 (1930), where the controversy between the parties had ceased and the court could not constitutionally proceed to adjudicate a merely hypothetical controversy.

The case of *Dinsmore vs. Southern Express Co.,* 183 U. S. 115 (1901), cited by this court in support of the decision in *Carpenter vs. Wabash Railway Co., supra,* may per-

haps be explained as such a moot case, although it might perhaps equally be dealt with above under the situation involving retroactive statutes. The War Revenue Act of 1898 had imposed certain obligations upon express companies. Certain shareholders of the defendant sought to enjoin compliance with these obligations and also compliance with an order of the Railroad Commission of Georgia which was based upon the statutory obligations. While the case was pending in this court, Congress, in 1900, enacted a statute relieving express companies of the obligation. The controversy between the parties thereby became purely hypothetical and the court reversed the decree of the Circuit Court of Appeals without determining whether the judgment of the court below was correct under the law existing at that time.

The case of *Watts, Watts & Co. vs. Unione Austriaca Di Navigazione*, 248 U. S. 9 (1918), relied upon by both the plaintiff and by Judge Allen in her dissenting opinion in the Circuit Court of Appeals, presents a similar situation, although it does not involve a moot case. The lower courts, as courts of a netural country, had exercised their discretion to decline jurisdiction of a controversy between alien belligerents. After the case had reached this court, the United States declared war against "Austro Hungary" and thus became a cobelligerent with the libelant. This court held as a result of the change in external conditions that the cause should be remanded with directions to the District Court to retain jurisdiction.

The rights of the litigants were in nowise affected by the court's applying the change of fact to the judgments of the courts below. The rights of the litigants remained exactly the same as they existed before the lower courts had refused to entertain jurisdiction. In reversing the judgment, this court enabled a subject of a cobelligerent to preserve its security under the bond which had been given

by the respondent for the release of the vessel. This was not the conferring of new rights upon the libelant, but simply the protection of existing rights. Even if the court had refused to reverse and remand, the rights of the libelant would have been in nowise impaired, although its security for those rights might have been lost.

Furthermore, as this court pointed out, the case was in admiralty in which the cause is heard *de novo* on appeal, so that the whole cause was before this court and it could well take into consideration the change in facts which had occurred subsequently to the judgments of the lower courts.

C. A Change of Law May Occur as the Result of a Decision of a Court of Last Resort So as to Bring Into Question the Validity of a Judgment Rendered by a Lower Court in the Absence of Such Decision.

Up to this point, we have considered the effect of a change of law by statutory enactment or amendment, and also a change of fact. We now consider the various types of changes of law by means of judicial decision.

1. State Courts

The litigation may involve and run through only a single integrated system of courts. We may first take the state courts, subject of course to ultimate review by this court. We may concede as a general proposition that when the highest court of a state changes the pre-existing law by overruling prior decisions, a judgment pending on appeal in such an integrated system of courts, which was right at the time it was rendered, will be reversed in order to conform to the law announced by the highest court in that integrated system. This would be true whether the decision announced by the highest court were a matter of first impression, that is to say, a declaratory or clarifying decision,

or whether the decision in fact overruled the settled law of the state. In the instant case, of course, we are only concerned with the latter situation.

Even in this situation, however, some courts have expressed their shock and bewilderment at the effect of such a rule of law which requires the reversal of a judgment which was correct at the time it was rendered simply because of an intervening change of law. In this connection, we direct the court's attention to the case of *Gilday vs. Smith Brothers,* 226 Mo. App. 1246, 50 S. W. (2d) 191 (1932).

The case dealt with a matter of remedy and procedure and did not involve the rights of the litigants. The question was whether a charge of the trial court on the burden of proof was correct. The trial court had instructed the jury in accordance with the law of Missouri at the time the charge was given. Subsequently, the Missouri Supreme Court overruled its earlier decisions and established a different rule. It was therefore contended that the judgment of the trial court should be reversed because it did not comply with the law of burden of proof as it was subsequently announced by the Missouri Supreme Court. The Missouri Court of Appeals, however, refused to apply to the instruction of the trial court the law as it was subsequently announced. The court says:

> "The error or lack of error must be determined according to the law at the time of trial. *That which was right when done cannot be made wrong by a subsequent change in the law. The prescience of the trial judge as to what the law may be tomorrow is not his guide, but his duty and prerogative is to declare the existing law and administer it without regard to clairvoyance.* To avoid error, he is not required to foresee events and to declare the law according to anticipated mental complexes of the court of last resort at a near or distant day. If a rule be declared according to existing law at the

> hour of the declaration, *can the court be put in error by a later change in the rule?* Reason answers 'No,' and so do the authorities. *A statutory or judicial change of the law is prospective and not retroactive in effect,* and any such change subsequent to the trial of a case, which has been conducted according to law at the time, does not alter, benefit or harm the rights and interests of the parties to that action." (Italics ours.)

It is only fair to the Court to say that the *Gilday* case has been questioned by subsequent decisions of the Supreme Court of Missouri. We submit, however, that its reasoning is unassailable. In fact, we venture to say that ultimately the law, as announced in the *Gilday* case, will be the rule universally applied even in appeals within an integrated system of courts, such as the state courts. Our reasons for saying this will be clear later on.

Nevertheless, we concede that the *Gilday* case is out of line with the authorities as to the effect of a subsequent change of law by judicial decision in an integrated system of courts, as *e.g.* the state courts.* An instance of the application of the general rule is found in the decision of this court in *Gulf, Colorado & Santa Fe Railroad Co. vs. Dennis,* 224 U. S. 503 (1912).

That case came to this Court from the courts of Texas on writ of error. The question involved was the validity of a state statute awarding attorneys' fees in certain types of action. After the case had reached this court, the Supreme Court of Texas held the statute invalid under the state constitution. This court applied the intervening decision of the Texas state court to the judgment which was before this court on writ of error. The court pointed out that although as a general proposition, it would not consider such a nonfederal question, nevertheless the intervening Texas decision had rendered it unnecessary to

* But see the Oklahoma and Montana cases, cited p. 12, *supra.*

consider the federal questions presented on the writ of error.

It will be observed that in the *Dennis* case, this court was acting as the ultimate reviewing tribunal of the state courts in an integrated system of courts, even though the review was limited to federal questions. The result was, and was bound to be, the same as it would have been if the question were presented to the highest tribunal of the state rather than to this court. This court was simply acting as a further reviewing court in a single integrated system of state courts. Consequently, this court considered the state law as announced by the state's highest court.

Not only, however, was this court acting as the ultimate reviewing court in a single integrated system of state courts, but it is important to observe that the Supreme Court of Texas, in holding the state statute invalid, did not effect a change of state law, but merely dealt with the validity of the state statute in a clarifying manner or as a matter of first impression. The Texas court, whose judgment was reversed by this court in view of the intervening decision of the state Supreme Court, did not follow any Texas law as it then existed. It blindly applied the Texas statute and gave it full effect. There was no change in state law to which this court gave effect. If these distinctions are borne in mind, it will at once be apparent that the *Dennis* case, which is so largely relied upon by the plaintiff, and was regarded by Judge Allen in her dissenting opinion as decisive of the appeal, in fact, has no bearing upon the instant problem.

2. Federal Courts on Federal Questions

The litigation may involve and run through only a single integrated system of courts, *e.g.* the federal courts, on purely federal questions. Here, likewise, it may be conceded as a general proposition that the overruling by

this court of pre-existing law will induce the reversal of a judgment of the lower court which was correct at the time it was rendered, *e.g.*: *Funk vs. United States,* 290 U. S. 371 (1933); *In Re Prudence Bonds Corp.,* 111 F. (2d) 37 (C. C. A. 2d, 1940).

The District Court and the Circuit Court of Appeals in the *Funk* case had followed earlier decisions of this court with respect to the admissibility or competency of testimony of the wife of a defendant in a criminal case as a witness in his behalf. This court had previously held that a wife could not testify in a defendant's behalf. When the case came up on *certiorari,* the court overruled its earlier decisions and reversed the judgments of the lower courts in consequence thereof.

We wish to point out, however, that even in the integrated system of federal courts on federal questions, the rule, which we concede governs as a general proposition, is not an inflexible one. As coming events do not always cast their shadows before, so subsequent events, such as a judgment of the highest court in an integrated system, do not always leave their shadows behind. An excellent example of a case in which this court refused to apply a later decision of this court to the judgment of a District Court will be found in the recent case of *Chicot County Drainage District vs. Baxter State Bank,* 308 U. S. 371 (January 2, 1940). That case, to be sure, is distinguishable from the instant one in that it involves the question of *res adjudicata* and collateral rather than direct attack upon a judgment of the federal District Court. But this is what the court said in its opinion:

> "The past cannot always be erased by a new judicial declaration."

Again, the court said:

> "* * * It is manifest from numerous decisions that an all-inclusive statement of a principle of absolutely retroactive invalidity cannot be justified."

Now, it is to be observed in connection with the doctrine of that case that there was no question at all of a change of law as the result of a decision of this court. This court had held the Municipal Bankruptcy Act unconstitutional, contrary to the judgment of the District Court in another case. The decision of this court, in the earlier case was clarifying in nature, a matter of first impression. There was no retreat from or overruling of the pre-existing law. The District Court had simply applied the Municipal Bankruptcy Act as a valid statute in exactly the same manner as the Texas courts had applied the Texas statutes in the *Gulf, Colorado & Santa Fe Railroad Co. vs. Dennis* case.

One might have thought, therefore, that when this court held the Municipal Bankruptcy Act unconstitutional, the earlier judgment of the District Court would be nullified because the foundation on which it rested had been swept aside. Nevertheless, this court held that its own decision rendered subsequently to the judgment of the District Court had no retroactive effect on that judgment for the reason that

> "The past cannot always be erased by a judicial declaration."

and

> "* * * an all-inclusive statement of a principle of absolutely retroactive invalidity cannot be justified."

Distinguishable as the case is from the instant one, we urge upon the court the application of its own language, that "there is no universal principle of retroactive invalidity." The instant case, like the *Chicot Drainage* case, is one in which that principle of retroactive invalidity should not be applied.

3. Coordinate Courts

Up to this point we have discussed the effect of a subsequent change of law by judicial decision on a judgment pending on appeal in a single integrated system of courts, such as the state or federal courts. We now come to the third situation, in which a subsequent change of law by judicial decision may bring into question the validity of a judgment rendered in the absence of the subsequent decision.

The litigation may run through the federal courts and involve a question of state law under the diversity of citizenship jurisdiction of the federal courts. Such a situation calls our attention to the fact that therein we are dealing, not with a single integrated system of courts, but with a coordinate system of courts, in which the federal and state courts perform parallel functions and exercise cordinate jurisdiction.

In an appeal from a judgment rendered by the District Court in such diversity of citizenship matters, the federal reviewing court must consider not only the correctness of the judgment as a general question of judicial action, but must likewise consider whether the District Court followed the mandate of *Section 34 of the Judiciary Act* and applied the substantive law of the state. In such cases the federal reviewing court has a dual function to perform. It must first determine whether the District Court applied the laws of the state as rules of decision; second, it must determine whether the judgment is correct in other respects, that is, whether there has been due process of law, an orderly trial, proper admission and exclusion of evidence, and like matters.

It seems to us that when the federal reviewing court has determined that the District Court did correctly apply the state law as a rule of decision, then the first function

of the federal reviewing court ceases and the court must proceed to exercise its second function and determine whether the judgment of the District Court is correct as a matter of general judicial action, that is to say, in respect of matters of practice and procedure and substantive questions not covered by the applicable rules of state law.

We list below three distinguishable and yet well recognized situations in which a federal reviewing court may be called upon to exercise its first function of determining whether the law of the state has been regarded as a rule of decision in accordance with the mandate of the Judiciary Act.

(a) State Law Settled in Federal Courts

In the first situation, the lower federal court will be called upon to apply the law of the state as the rule of decision, although the state law has not been determined by the state's highest tribunal. The lower court will, however, find decisions of this court or the lower federal courts which have already decided the question of state law in accordance with their understanding of that law. The state law may thus be deemed settled in the federal courts when the question arises again in the federal court. The lower court must, of course, apply the state law as it has been determined by the federal courts, if those courts happen to be superior to the federal trial court.

After the judgment is rendered by the lower court in accordance with the earlier decisions of the superior federal courts, the highest court of the state in a *clarifying* decision, may then decide the applicable state question in a manner directly contrary to the law as it was deemed settled by decisions of the federal courts. The question then arises whether this subsequent determination of state law by the highest court of the state can affect a judgment of the lower federal court which was correct when it was

rendered, inasmuch as it followed the decisions of the higher federal courts, which were the only adjudications on the state question.

This court has repeatedly held that the judgment of the lower federal court, which followed the higher federal courts on the question of state law, need not be reversed merely because of the subsequent determination of state law by the state's highest court contrary to the judgment of the lower federal court. Cf. *Rowan vs. Runnels,* 5 How. 134 (1847); *Pease vs. Peck,* 18 How. 595 (1856)*

A contrary conclusion was reached by the Circuit Court of Appeals for the Third Circuit in *Abraham vs. National Biscuit Co.,* 89 F. (2d) 266 (1937). The question before the court was the charge of the trial court on a Pennsylvania statute. In an earlier case the Circuit Court of Appeals, in the absence of any construction of the Act by the Pennsylvania courts, had construed it so as to prevent the jury's bringing in a joint verdict against several defendants. The trial court in its charge had followed this interpretation of the Act.

After the judgment of the trial court, the Pennsylvania Supreme Court construed the Act in such a manner as to permit the bringing in of a joint verdict by the jury. In view of this decision, the Circuit Court of Appeals reversed the judgment of the trial court although it was concededly correct at the time of its rendition. The Circuit Court of Appeals was, however, careful to point out that *no rights of the litigants were involved,* and that the construction of the Act involved only a question of remedy and procedure. The court relied upon *Bayserman vs. Blunt,*

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* We cite these only as *"cf."* cases because it is not clear in the *Rowan* case whether the clarifying state decision antedated the federal suit (*Gelpcke vs. Dubuque*) or merely antedated the federal trial court judgment, and because it is not clear in the *Pease* case whether there were only decisions of this court on the state question at the time of the federal trial court judgment or were also decisions of the Michigan Supreme Court to the same effect.

147 U. S. 647 (1893) and intimated that the result would be different if the application of the subsequent construction of the statute by the Pennsylvania court to the federal judgment necessitated an impairment of the substantive rights of the litigants.

(b) State Law is Res Integra

In a second situation, the applicable question of state law is undetermined by either the federal courts or the highest court of the state; the state question is *res integra* when it arises in the lower federal court. The lower federal court thus must reach its own conclusion as to the applicable state law and render judgment accordingly. Subsequently, the highest court of the state in a *clarifying* decision, determines the applicable question of state law in a manner directly contrary to the conclusion reached by the lower federal court. The judgment of the lower federal court would, therefore, be erroneous if rendered subsequently to the determination by the state court.

The question then arises whether on appeal the judgment of the lower federal court must be reversed because of the intervening state court decision. A well known instance of this situation is presented by the leading case of *Burgess vs. Seligman*, 107 U. S. 20 (1883).

That case involved the interpretation of a Missouri statute concerning a pledge of stock by a railroad as collateral security. At the time the case was pending in the federal circuit court, there had been no construction of the statute on the point in question by the Missouri Supreme Court. The federal circuit court, therefore, construed the statute in accordance with its understanding of the law of Missouri, and held that the defendant, as pledgee of the stock, came squarely within the exemption provision of the statute.

While the case was pending in this court on writ of error, the Missouri Supreme Court construed the statute in a different manner and held that one situated like the defendant did not come within the exemption provision of the statute and would be liable. The contention was therefore made in this court that the subsequent determination of the question of state law by the Missouri Supreme Court required the reversal of the judgment of the federal circuit court even though that judgment were correct at the time it was rendered. This court, however, held that the decision by the Missouri Supreme Court did not have a retroactive effect on the federal judgment. On pages 33-34 of 107 U. S., this court said:

> "We do not consider ourselves bound to follow the decision of the state court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. * * * So when contracts and transactions have been entered into and rights have accrued thereon, *under a particular state of the decisions* or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. * * *" (Italics ours.)

Again, on page 35, the court says:

> "* * * *It can hardly be contended that the federal court was to wait for the state courts to decide the merits of the controversy and then simply register their decision; or that the judgment of the circuit court should be reversed merely because the state court has since adopted a different view.* * *" (Italics ours.)

Now, in both of the above situations, that is to say, either when the applicable question of state law is a matter

of first impression in the lower federal court or when it has previously been determined in the federal courts, it may at least be contended that because of the mandate of the Rules of Decision Act, a judgment of the federal court, which becomes out of accord with the state law because of a subsequent decision of the state's highest court, should be reversed even though it may be regarded as correct at the time of its entry. This contention would be based upon the fact that, although through no fault of its own, the lower federal court had in fact failed to apply the state law in rendering judgment. The lower federal court would thus be in the same position as a lower state court seeking to determine the same question of state law. Making an attempt to determine that law and exercising its best judgment, the lower federal court, like a lower state court, would nevertheless have determined the state question erroneously because of the subsequent determination of that question in a different manner by the state's highest court. It might, therefore, be said that the federal judgment should be reversed because the federal court had in fact failed to apply the state law.

A long line of decisions of this court, however, among which are the cases we have cited, have held that this contention, which we say might be made, should have no weight. And this court has repeatedly held that even though, through no fault of its own, the lower federal court had erred in determining the applicable question of state law in view of the subsequent determination of that question by the state's highest court, the federal judgment should be left standing if it is correct in other respects having no connection with the Rules of Decision Act.

The reason why this court has so held in an unbroken line of decisions is because in such matters the federal courts are exercising a parallel and coordinate jurisdiction with the state courts. It is an independent jurisdiction;

and the state courts cannot compel the federal courts to change their judgments. The lower federal court may be in error on the state question in the same manner and for the same reason as a lower state court. We have seen above on page 42 that such a judgment of the lower state court or lower federal court in a federal matter would be reversed when the ultimate reviewing court in the integrated system of courts determines the applicable question of law. But this court has refused to place a lower federal court in diversity of citizenship matters in the same category with a lower state court dealing with state questions or with a lower federal court dealing with federal questions.

In other words, such cases as *Burgess vs. Seligman* make it abundantly clear that the federal court in diversity of citizenship matters is not subordinate to the integrated system of state courts so as to be in the same position as a lower state court in that system, but is actually independent of the whole system of state courts and must exercise its independent judgment in reaching conclusions on state questions when those questions have not already been determined by the state's highest court.

(c) Overruling State Decision

The Court will mark that we have sought to deal with practically every conceivable situation in which a subsequent change of law or fact might be thought to have some bearing upon the validity of the judgment of a lower court rendered in the absence of such law or fact. In doing this, we have attempted to narrow the problem and in the following discussion to present to the court the precise problem involved in the case at bar.

As we have pointed out in the immediately preceding discussion, where we dealt with *clarifying* state decisions, an argument *could* be made that when a federal district

court in a diversity of citizenship matter reaches a conclusion on an applicable question of state law, either as a matter of first impression or in accord with decisions of higher federal courts (in the absence of a determination of the local question by the state courts), and after the judgment of the federal District Court the state law is determined by the state's highest court contrary to the judgment of the federal court, the federal judgment should be reversed in view of the new determination of state law. This argument could be made for the reason that the federal court had simply failed to apply the state law and had erred in its conclusion as to what the state law was, although through no fault of its own, but nevertheless in "violation" of Section 34 of the Judiciary Act. The decisions of this court, however, which we have cited, uniformly hold that the federal judgment should not be reversed in such a situation, or at least *need* not be reversed. Whether those decisions* are still law, in view of *Erie Rail-Road Co. vs. Tompkins*, or for any other reason, is of no concern here. That question is not before the court, since those cases dealt only with the effect of a *clarifying* state decision on a federal judgment. We come then to the question which is before the court, the third of the three alternatives involving the effect of a subsequent change of state law on a federal judgment in a diversity of citizenship case.

Suit is brought in the federal District Court under the diversity of citizenship jurisdiction. The only questions involved are matters of state law. At the time suit is brought and when the judgment of the lower court is rendered, the state law is settled by decisions of the state's highest court. Applying the state law to the question involved, the federal District Court enters judgment in accord with the state

* It is interesting to observe that in the majority opinion in the *Erie* case many cases presenting similar situations but involving questions of what was formerly deemed "general" law were cited with apparent disapproval. *Burgess vs. Seligman* was not cited by the majority!

court's decisions and thus follows the mandate of *Section 34 of the Judiciary Act*.

This is the precise situation that was presented by the instant case after the rendition of the judgment by the District Court; and as we pointed out above, page 4, plaintiff has conceded that such is the case.

An appeal is taken from the federal judgment to the Circuit Court of Appeals or, for that matter, *certiorari* is brought to this court. While the appeal or *certiorari* is pending, the highest court of the state overrules its earlier decisions and completely changes the law as it existed when the District Court rendered judgment. Such a change of state law may occur for any one or more of numerous reasons, such as a change in the personnel of the court or a reconsideration by the same court of the pre-existing law. Of course, the reasons for such change are of no concern to the federal courts. The federal courts deal solely with the fact that the state law has changed.

That is what happened pending the appeal of the instant case in the Circuit Court of Appeals. The Ohio Supreme Court by a bare majority of 4 to 3 expressly overruled two of its earlier decisions and completely repudiated the law of Ohio as it had been settled for more than a quarter of a century. Apart from the fact to which we have adverted above, page 12-3, that despite the overruling of these earlier decisions in the consolidated *Triff* case, one of the two overruling decisions is still a pending matter and has not been tried at the date of this hearing, so that it is again subject to review and reversal by the Ohio Supreme Court (cf: *Wichita Royalty Co. vs. City National Bank of Wichita Falls*, 306 U. S. 103, at 107), it must be conceded for the purposes of the case at bar that the law of Ohio has been changed, at least temporarily. The question is thus presented whether the change of state law has a retroactive effect upon a judgment of the federal court in

a diversity of citizenship matter, which was right when it was rendered.

The authorities, which we have cited, quoted and discussed at some length, uniformly hold that the judgment of the federal court in such a case should not be reversed because of the change of state law.

Concordia Insurance Co. vs. School District, 282 U. S. 545 (1931);

Milwaukee, E. R. & L. Co. vs. Wisconsin ex rel Milwaukee, 252 U. S. 100 (1920);

Roberts vs. Northern Pacific Ry. Co., 158 U. S. 1 (1895);

Morgan vs. Curtenius, 20 How. 1 (1859);

Northrop vs. Columbian Lumber Co., 186 Fed. 770 (C. C. A. 5th, 1911);

Westinghouse Air Brake Co. vs. Kansas City Southern Railway Co., 137 Fed. 26 (C. C. A. 8th, 1905);

Board of Councilmen of City of Frankfort vs. Deposit Bank of Frankfort, 124 Fed. 18 (C. C. A. 6th, 1903).

These authorities are the only ones which deal with the precise question now before the court. They must be carefully distinguished from cases which we have cited which deal, not with the effect of a *change* of state law and the *overruling* of earlier state decisions, but with *clarifying* state decisions which give a new pronouncement of what the state law was thought to have been prior to its determination by the state's highest court. In other words, in every decision of this court in which this court has given effect* to a subsequent decision of the state court on a prior judgment of a federal court pending an appeal, the

* Since the state decision in such cases is merely *clarifying*, by giving it effect and applying it to a prior federal judgment, it does not in fact have a retroactive operation on the federal judgment.

state court decision was simply a clarifying and not an overruling decision. This distinction is extremely important, and we urge it upon the court's attention. Such clarifying state decisions were involved in the following decisions of this court:

Gulf, Colorado & Santa Fe Railroad Co., vs. Dennis, 224 U. S. 503 (1912);

Chicago, M. St. P. & Pac. Railroad Co. vs. Risty, 276 U. S. 567 (1928);

Sioux County vs. National Surety Co., 276 U. S. 238 (1928);

Oklahoma Packing Co. vs. Oklahoma G. & E. Co., 309 U. S. 4 (1940).

As to whether the court in these cases has wisely applied a subsequent clarifying decision to the judgment of the federal court pending an appeal, is beside the point, and we express no opinion thereon. Certainly in numerous other cases (*Burgess vs. Seligman; Pease vs. Peck;* etc., all *supra*), this court has refused to apply even a clarifying state decision to a federal judgment. But that a retroactive effect should not be given to an *overruling* decision of the state court on a federal judgment must follow from the inherent nature of the coordinate system of federal and state courts.

The federal courts exercise an independent coordinate jurisdiction with the state courts. They are not subordinate to either the lower state courts or to the highest state court. Their jurisdiction is parallel and coordinate. When they have correctly applied the state law in accordance with existing state court decisions, the rights of the litigants under the state law are fully satisfied. Whether this should be true in matters of procedure as well as substance is a question on which we express no opinion, for the instant case concerns only a matter of substance.

The cases which we have cited above as authority for the defendant's position are on all fours with the instant case. They did not involve common law decisions of the state courts. They dealt solely with the interpretation of state statutory and constitutional provisions and local rules of property, such as the effect of deeds, conveyances and the like, and the bearing of local statutes on such rights of property (*Morgan vs. Curtenius, supra*). Similarly, the overruling state decisions in those cases dealt with questions of statutory and constitutional interpretation and matters of purely local concern.

So, in the instant case, we are dealing with decisions of the highest court of Ohio, which at the time of the judgment of the federal District Court were decisions on purely local matters. The *Zajachuck* and *Mabley & Carew Co.* cases, *supra*, which were overruled by the Ohio Supreme Court, were based squarely on the interpretation of the *Ohio Constitution, Article II, Section 35*, and the *Workmen's Compensation Act of Ohio*. The Ohio Supreme Court construed those statutory and constitutional provisions as depriving employees of common law remedies for noncompensable occupational diseases. Likewise, the overruling Ohio decision, which the plaintiff urges upon this court, the consolidated *Triff* case, involved a construction of the same Ohio Workmen's Compensation Act and the same Ohio constitutional provision, the Ohio court holding that they did not bar employees from a common law remedy for noncompensable occupational diseases.

(d) State Courts on Federal Questions Do Not Exercise Co-ordinate Jurisdiction.

It will undoubtedly occur to the court that the proposition for which we contend (that in a coordinate system of courts, an overruling decision in one system of courts con-

struing a statute of that jurisdiction will have no retroactive effect on the judgment of a lower court in the coordinate system of courts) does not apply to all coordinate systems of courts, and therefore that the rules of law laid down by this court for more than a hundred years should be re-examined and perhaps overruled.

Thus, the converse of the instant case may occur. A state court may have occasion to pass upon a purely federal question. At the time the lower state court renders judgment, the particular federal question may be settled by decisions of this court. Subsequently, this court may overrule its earlier decisions and decide the question in another manner, so that the judgment of the state court would be erroneous if rendered subsequently to the overruling decision of this court.

If such a case were presented, undoubtedly the judgment of the lower state court would be reversed. But this would not be because an overruling decision of one system of courts had a retroactive effect on a coordinate system of courts. In such case, the judgment of the lower state court would have to be reversed for two reasons: *First,* because under the Constitution, the laws of the United States, as expounded by this court, are the supreme law of the land and would be binding both upon the states and the state courts; *second,* because in such a situation, we should not be dealing with a coordinate system of courts at all. We should be dealing entirely with a single integrated system of courts exactly as in the case of *Gulf, Colorado & Santa Fe vs. Dennis, supra.* Irrespective of supervening overruling decisions by this court, the judgment of the lower state court on federal questions would be subject to ultimate review by this court. This court would simply constitute the cornice in the edifice of courts (the state courts) handling the particular federal question.

In federal matters, the state courts do not exercise a

jurisdiction parallel to and coordinate with the federal courts. Unlike the jurisdiction exercised by the federal courts in diversity of citizenship cases, the jurisdiction of state courts on federal questions is decidedly subordinate to the determination of such matters by this court; and in fact, on all federal questions, the decisions of the state courts are subject to review by this court.

This distinction, which obliterates any thought that the state courts in federal matters may be regarded as exercising a parallel and coordinate jurisdiction with the federal courts so as to constitute a coordinate system of courts, becomes more apparent if we consider what would happen to federal and state questions arising as matters of first impression. If the state question arose for the first time in a diversity of citizenship case in the federal courts, the chances are that this court would not grant *certiorari*. If this court did undertake to review a federal judgment on a state question, the determination of the matter by this court would be final.

If, on the other hand, a federal question arose in the state courts as a matter of first impression, the determination of that question by the highest tribunal of the state would not close the matter. The decision of the state court would be subject to direct review by this court.

Hence, state courts, in dealing with federal questions, are not functioning as part of a coordinate system of courts in the sense in which we have used that term and dealt with that concept of parallel judicial action. There is only one instance in the whole expanse of our judicial system in which any of the courts may be said to be acting in a coordinate system of courts. That is when the federal courts exercise their diversity of citizenship jurisdiction and act solely upon questions of state law. The authorities of this court, which we have cited, uniformly hold that when the federal courts do exercise such coordinate jurisdiction in

the coordinate system of courts, a supervening overruling decision of the highest court of the state will have no retroactive effect upon the judgment of a federal court in such coordinate matters.

In order to illustrate the various situations which we have dealt with, and to demonstrate more clearly the narrow and precise problem which is now before the court, and the effect of an overruling decision of an ultimate reviewing tribunal on the judgment of another court which was correct when entered, we present a series of diagrams. A key to the diagrams is as follows:

x=Judgment of trial court.
A=Affirmance of judgment of trial court.
R=Reversal of judgment of trial court.
NSC=Noncommital statute, that is, period of operation of statute whether prospective or retroactive not clear.
P=Clearly prospective statute.
RSP=Clearly retroactive or retrospective statute which is constitutionally valid.
DC=Federal District Court.
CP=State Common Pleas or trial court.
CCA=Circuit Court of Appeals.
Sup. Ct.=United States Supreme Court.
S. Ct.=State Supreme Court, or highest court of state.
Ct. App.=Intermediate State Appellate Court.
Cl=Clarifying Decision.
O=Overruling Decision.
SF=Change of State of Facts or External Conditions.
Stat.=Statute.
Dec.=Decision.
St.=State.
F.=Federal.

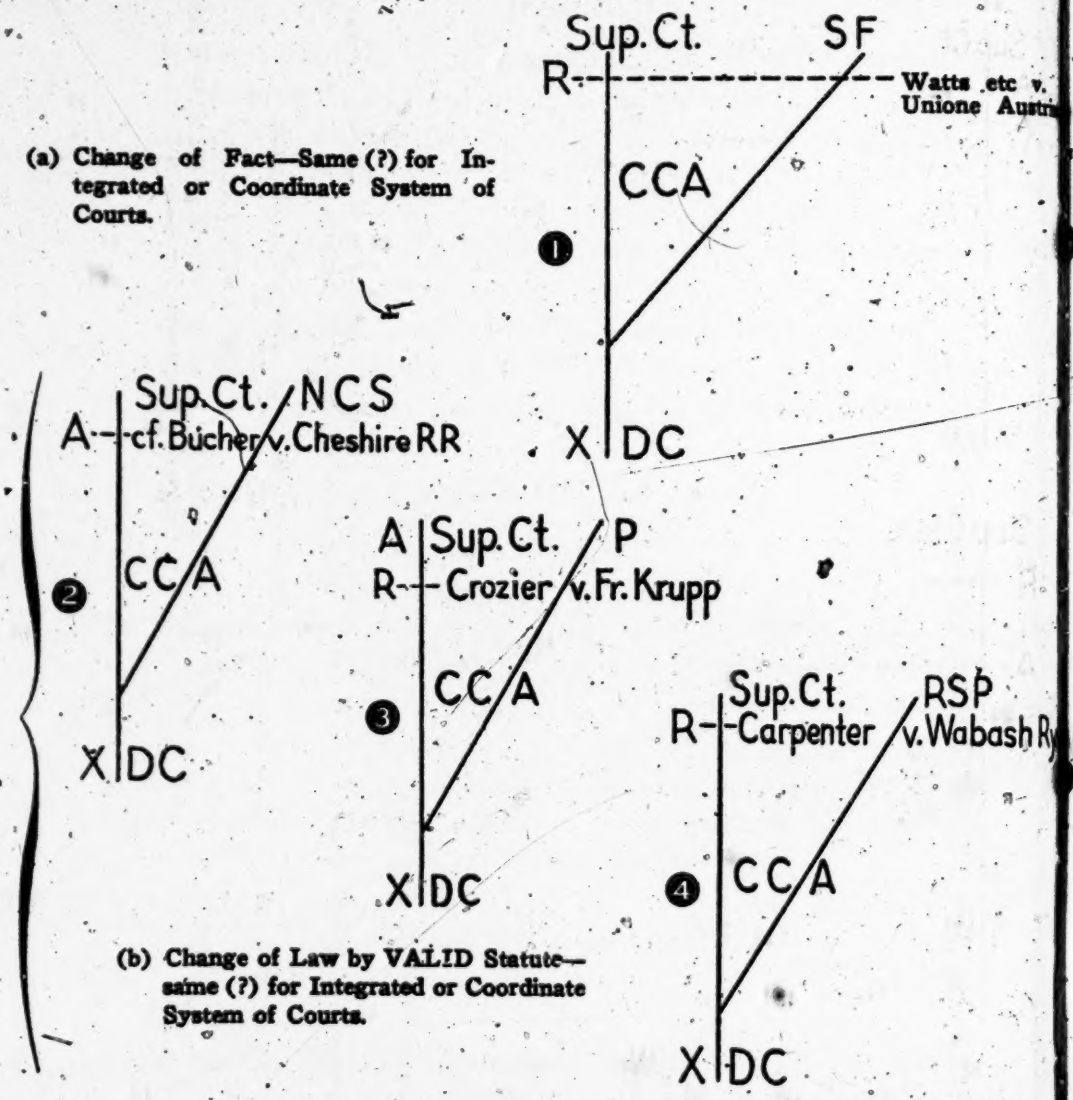
1. Showing The Narrow Problem of Instant Case

ange of Fact

ange of Law by Statute
- Retroactive
- Noncommittal
- Prospective

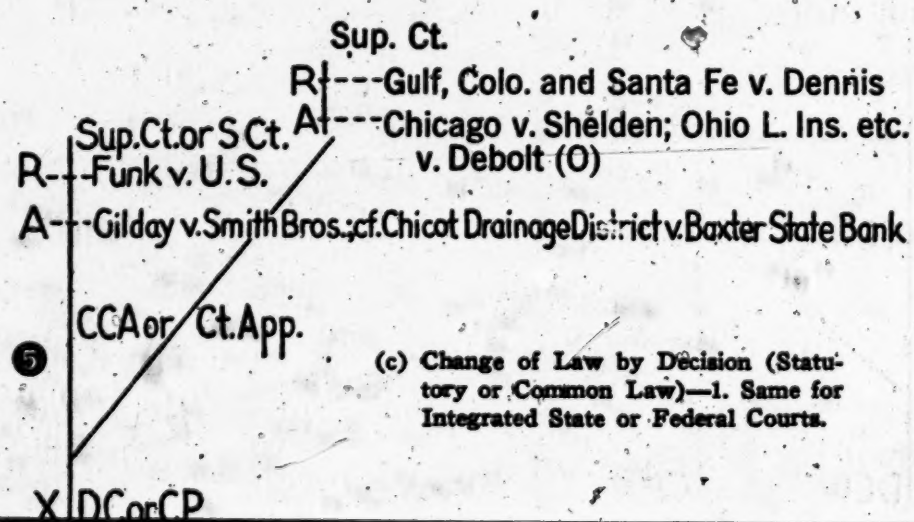
ange of Law by Decision
- St. Cts. on St. questions—U. S. Sup. Ct.
- F. Cts. on F. questions—U. S. Sup. Ct.
- Coord. Cts.—F. Cts. on St. questions—U. S. Sup. Ct.
  - St. question previously decided in F. Ct.—cf. Rowan v Runnels—clarifying St. decision.
  - Res Integra in F. Ct.—Burgess v. Seligman.
  - **INSTANT CASE**
  - F. Ct. applies St. Law—St. overruling decision—Morgan v. Curtenius; Concordia Ins. Case, etc.

2. Showing the Broader Problem, and the Narrow Problem of Instant Ca



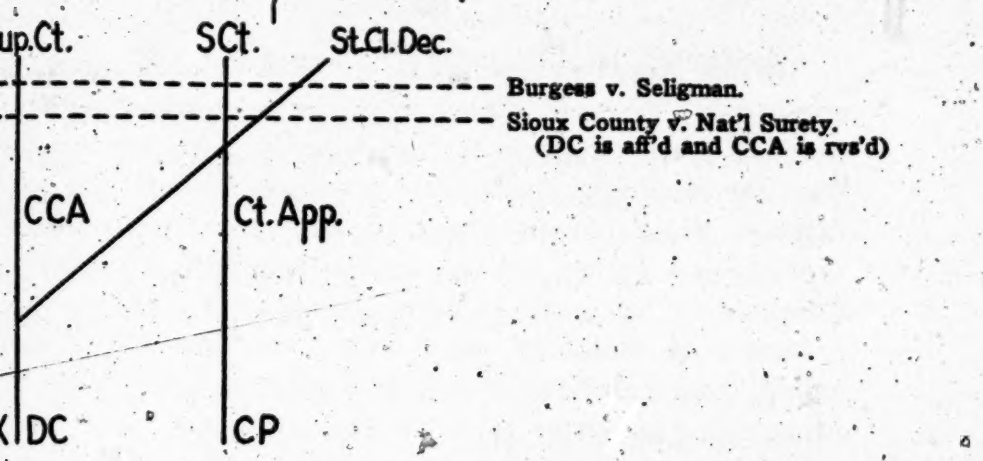
(a) Change of Fact—Same (?) for Integrated or Coordinate System of Courts.

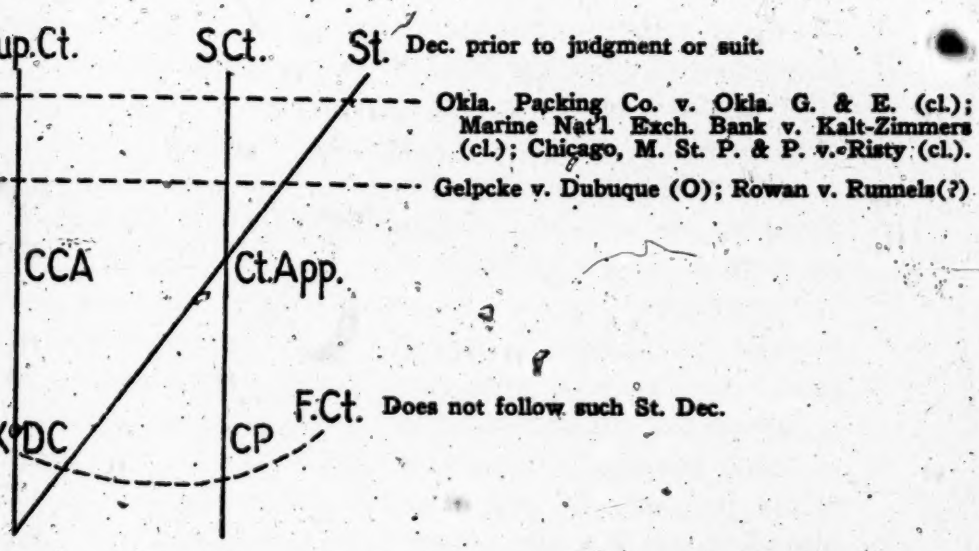
(b) Change of Law by VALID Statute—same (?) for Integrated or Coordinate System of Courts.

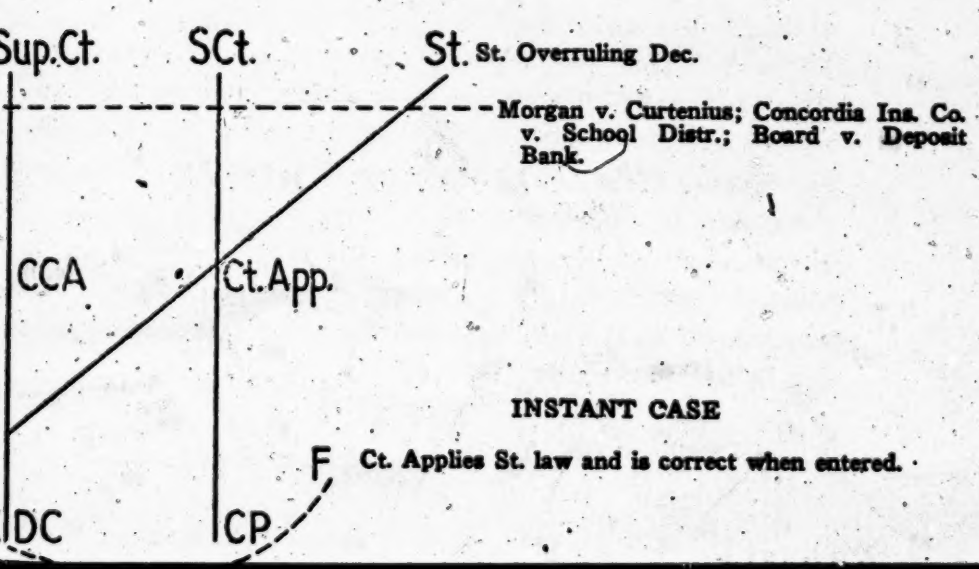


(c) Change of Law by Decision (Statutory or Common Law)—1. Same for Integrated State or Federal Courts.

3. Coordinate Courts—Federal Court on State Question.







In the foregoing discussion, we have pointed out that an imposing array of authorities, dating back well-nigh a hundred years, supports the defendant's position. Apart from the Municipal Bond cases, we have listed *all* the authorities which have any bearing on the narrow, precise problem now before the court. All those authorities uniformly hold that a supervening overruling of state law on a matter of statutory construction will not affect the validity of a judgment of a federal court in a diversity of citizenship case so as to make that erroneous which was not so when the judgment was entered. Even if the law settled by these decisions were erroneous, which we shall demonstrate is not the fact, we earnestly submit to the Court that it would be unwise to overrule a principle of law which is so well settled and entrenched in judicial thought.

We need not draw the attention of the court to the advisability and necessity of stability in judicial decision. If we were dealing with vague concepts like "due process" or "commerce," into which concepts the courts have been thought to read notions of their own over a long period of time, which notions were subsequently determined to be erroneous and not warranted by the vague general concepts of "due process," "commerce" and the like, this court would not only be warranted in overruling established precedent, but it would appear to be the duty of this court to do so.

The instant case, however, involves no such vague general concept, but a very concrete matter such as the power of the federal courts exercising diversity of citizenship jurisdiction under the Constitution of the United States and compelled by the Rules of Decision Act to apply the applicable law of the state. We, therefore, urge upon the court the desirability of adhering to established precedents which have, as it were, acquired the sanctity and veneration due to their antiquity.

II The Effect of Erie Railroad Co. vs. Tompkins.

Plaintiff contends that the *Erie* case requires a reversal of the judgments of the courts below. An understanding of the *Erie* case proves that this is not so, and that it neither has any independent effect upon the instant problem, nor does it in anywise weaken the authority of the decisions of this Court which we have cited and on which we rely.

The *Erie* case simply overruled the long accepted doctrine of *Swift vs. Tyson*. This court held on the basis of certain researches of Mr. Charles Warren, published in *Vol. 37 of the Harvard Law Review, 49 to 132*, that the construction of *Section 34 of the Judiciary Act of 1789* by the court in *Swift vs. Tyson* was erroneous and that the Judiciary Act required the federal courts to regard the laws of the several states as rules of decision in trials at common law both in matters of common law and in questions of statutory or constitutional construction and purely local property law. The *Erie* case presented a matter of common law, and this court held that the federal courts in a diversity of citizenship case were required to follow the applicable law as determined by the highest court of Pennsylvania, which the federal courts had refused to consider.

The authorities, which we have cited above and on which we rely, such as the *Concordia Insurance Co.* case, *Morgan vs. Curtenius, Pease vs. Peck, Board of Councilmen vs. Deposit Bank*, and the other decisions did not involve common law decisions of the state courts. They were cases in which the federal courts had applied as the rule of decision, in accordance with the mandate of the Judiciary Act, decisions of the state courts construing state statutes, constitutional provisions and dealing with local rules of property. Those cases were thus never within the rule of *Swift vs. Tyson*.

This court had repeatedly held that in such matters of purely local property law and in questions involving the interpretation of state statutes and constitutional provisions, the federal courts were bound to follow the decisions of the state courts even while at the same time they reserved the right under the rule of *Swift vs. Tyson* to refuse to follow decisions of the state courts in matters of common law. Even while so holding, however, this Court likewise held that when the lower federal courts had followed the decisions of the state courts in purely local matters, such as property law and the interpretation of the state statutes and constitutions, an overruling of the state law in such matters had no retroactive effect on the judgment of a federal court which correctly applied the law of the state under the mandate of the Rules of Decision Act. The authorities on which we rely were, therefore, an exception to the rule of *Swift vs. Tyson*, and were never within that rule. The *Erie* case dealt solely with the problem presented by *Swift vs. Tyson*. Consequently, the *Erie* case leaves the decisions on which we rely as an unbroken line of precedent and unshaken authorities which, we submit, are determinative of the instant case.

All that was said in the opinion in the *Erie* case beyond what was necessary to overrule *Swift vs. Tyson* and give a correct interpretation to the Rules of Decision Act, in accordance with the researches and discoveries of Mr. Warren, is pure *dictum* and of no binding effect. It is true that the Court went out of its way in the *Erie* case to discuss the constitutional question of the judicial power of the federal courts in diversity of citizenship matters. If this court should regard the statements in the *Erie* case on such constitutional matters as bringing into question the vitality and propelling force of the authorities we have cited, we shall point out to the court in a subsequent part of our ar-

gument that those statements were misconceived and the conclusions therein reached unsound.

While speaking of the *Erie* case, it is well to observe that nothing either said or decided therein supports the contentions of plaintiff or in anywise casts doubt upon defendant's position. The *Erie* case held that the District Court must apply the law of the state. The District Court did precisely that, even though it was bound to do so before the *Erie* case was decided because the state matter involved was a question of state statutory and consitutional construction. As the court below said with respect to this fact,

> "It would be anomalous to now hold the decision right because it was then wrong, *or that a state court has power to compel reversal of a federal decision correctly applying existing state law.*" 110 F. (2d) 313. (Italics ours.)
>
> "If the District Court had decided the present case adversely to the defendant, it would have defied the mandate of the Judiciary Act." (*ibid.*)

If the judgment of the District Court should be reversed because of the overruling of the state law by the Ohio Supreme Court, it would be tantamount to holding that the District Court had a right to defy the mandate of the Judiciary Act or that in the language of the *Gilday* case, *supra*, page 43-4, the lower court must be deemed to have had the prescience to determine what the Ohio law would subsequently or ultimately be. A reversal of the judgment in the present case would have the same practical effect as the affirmance of a judgment of the District Court which had failed to apply the Ohio law at the time of judgment.

The *Erie* case thus, in effect, supports the contentions of defendant in holding that the federal court must apply the law of the state. To attribute to the *Erie* case any other

significance out of harmony with defendant's position would be to bestow upon it an import which it does not and cannot have.

III Analogies to the Instant Case and Practical Considerations Support the Judgment of the Lower Court.

1. Repeated Overrulings by State Court.

Let us start with the judgment of the Circuit Court of Appeals. Suppose that the Circuit Court of Appeals had reversed the judgment of the District Court and given effect to the *Triff* case which overruled the decisions of the Ohio court in effect at the time of the District Court judgment. There is no assurance whatever that the Ohio Supreme Court would not again overrule itself after the judgment of the Circuit Court of Appeals and before or after the case reached this court on *certiorari*. Or if this court should reverse the judgment of the two lower courts and give effect to the overruling *Triff* case, there is no assurance but what the Ohio Supreme Court will again overrule itself and restore the state law in effect at the time of the District Court's judgment before another trial in this case is reached in the District Court or even thereafter pending a second appeal to the Circuit Court of Appeals.

This process of overruling itself is not uncommon in state courts. It is particularly likely and is a factor which must be taken into consideration when it is borne in mind that the judges of the state courts are elected and their tenures of office uncertain. If, therefore, this court should give effect to one overruling decision on a matter of state law, we earnestly ask the court: *to how many such overruling decisions should the federal courts give effect?* Should the federal court stop when they have once given effect to a single overruling decision, or should they set

aside the judgment and apply the new state law each time that it is changed by the state's highest court?

This court will undoubtedly say that it will deal with such a question when the situation is presented and when it is actually confronted by several successive overruling state decisions. To this we say that even though this complex or hypothetical situation may never have occurred in the whole history of the joint federal and state judiciaries,* it is certainly a possibility; and this court, in dealing with the instant case, *must recognize that it will be laying down a principle of law of universal application which must take care of the complicated hypothetical situation when and if it ever does arise.*

The federal courts, whose judges hold office during good behavior, that is, for life, cannot permit their judgments to be made the football of the vacillating opinions of other tribunals with respect to the governing law, especially where the judges of those other tribunals are elected to the bench and their tenure of office is uncertain.

The present case has been in the federal courts for well-nigh three years. If this court should reverse the judgment of the lower courts, it may be in the federal courts for another three years or more through no fault of either of the parties litigant. As we have pointed out above, page 13-4, numerous changes have already occurred in the personnel of the state court, whose law the District Court in the instant case was bound to follow. Other changes in the personnel of the Ohio Supreme Court may well occur before the final disposition of this cause, if the judgment in the instant case is reversed. When the fact is borne in mind that the *Triff* case, which overruled the pre-existing law, was decided by a divided court with a bare majority of 4

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* But see *Oklahoma Packing Co. vs. Oklahoma G. & E. Co.*, 309 U. S. 4 (1940), and *Great Northern R. Co. vs. Sunburst Oil & Ref. Co.*, 287 U. S. 358 (1932).

to 3, and that the two new members, who were elected to the Ohio Supreme Court in the last November election and will take their seats on the bench in January, 1941, are in themselves sufficient to overrule the *Triff* case and reinstate the law of Ohio in effect at the time of the District Court judgment in the instant case, we feel that this court must take into consideration the possibility of a further overruling or several overrulings, even during the continued pendency of the instant case.

Unless, therefore, this court is willing to lay down a rule of universal application, that a federal judgment in a diversity of citizenship case, which correctly applies the state law, must be reversed every time the state law is changed, we do not believe it would be wise policy or sound law for this court even to consider upsetting the judgment in the instant case and giving effect to the overruling *Triff* case. Nor do we believe that this court would ever consent to laying down a principle of law which required a judgment of the federal court to be reversed every time the state's highest tribunal overruled itself.

Apart from the confusion that would undoubtedly result from the operation of such a principle of law, and apart from the temptation of parties to "get up a cause in the state court for the very purpose of anticipating" a decision in the federal court and requiring the reversal of the federal judgment (See *Pease vs. Peck,* 18 How. at 599), the value, utility and dignity of the whole federal court system would undoubtedly suffer greatly in the minds of both the bar and laity. The *Oklahoma Packing Co.* case, *supra,* affords an excellent illustration of how the dignity and prestige of the federal courts might suffer as a result of subordinating their decisions, once correctly made, to the changes of opinion of the state courts. We have already distinguished that case from the instant one, and have pointed out that it has no bearing upon our problem.

Nevertheless, we believe the change of position and withdrawal of an opinion by this court in the *Oklahoma Packing Co.* case demonstrate the unwisdom of such procedure and in fact categorize it as the very "juristic sport" with which this court in its withdrawn opinion disparaged the case of *Gelpcke vs. Dubuque.*

Bench, bar and laity look not only to this court, but to all courts, for stability of decision and impute to this and all courts an almost divine knowledge of the law. They look to the pronouncements of the court as finally settling the matters in controversy. When a court reverses itself on rehearing or on a second appeal, it loses considerable prestige in the eyes of the common people, to say nothing of the bench and bar; and they cease to look upon a court, which performs such antics, as a responsible prognosticator or announcer of the law of the jurisdiction. When the court undertakes not only to reverse itself on a rehearing or second appeal, but to subordinate its judgments to the changing opinions of courts in another jurisdiction, then, we submit, the value and prestige of the whole judicial system must suffer irreparably; and people will no longer look to the courts for the ultimate determination of justice.

That the *United States Supreme Court* (*Oklahoma Packing Co.* case) should change *its* opinion, simply because of a change in the opinion of the Oklahoma Supreme Court, is incredible to a large section of the bench and bar and incomprehensible to the laity in general. That the federal courts, exercising coordinate jurisdiction, should change their judgments and opinions *every time* the opinions of the state court change will be equally unfathomable.

2. Analogy from Statutory Interpretation.

Let us suppose that a statute of the State of Virginia is enacted *verbatim* by the legislature of Maryland. It is a general rule of construction that in such case the courts of Maryland will adopt the interpretation of their own statute which the courts of Virginia have given to the statute from which the Maryland statute was taken. Let us suppose further that a suit is brought in the Maryland courts involving the Maryland statute, and that at the time suit is brought, the Virginia statute had received a settled construction by the highest court of Virginia. The lower Maryland court will undoubtedly adopt for the construction of its own statute the construction given to the Virginia statute by the highest court of Virginia, in the absence of a profound conviction that the Virginia interpretation is erroneous and would not be adaptable to the situation in Maryland.

Now, suppose further that having adopted the construction of the Virginia statute for its own statute, the lower Maryland court renders a judgment in favor of the defendant based upon that construction of the Maryland statute. The judgment of the Maryland court is then appealed to the highest court of Maryland, and the plaintiff-appellant contends that the construction given to the statute by the lower court and by the Virginia courts of the Virginia statute is erroneous. While the appeal is pending, the Virginia court overrules itself and gives a contrary construction to the Virginia statute. Would the Maryland Court of Appeals reverse the judgment of the lower court on the statutory question simply because the Virginia court had overruled itself with respect to the construction of the Virginia statute?

Although we can cite no authority which has dealt with this situation, we believe no state reviewing court

would undertake to reverse the lower court on the question of statutory construction simply because a court in a foreign jurisdiction had overruled itself. The Maryland court might, of course, decide that the interpretation given to the Maryland statute by the lower court in Maryland was erroneous either as a matter of first impression or because of the overruling of the interpretation of the Virginia statute by the Virginia court. The Maryland court, in other words, would feel free to reverse the judgment of the lower court. But we do not believe it can be seriously contended that the Maryland court would feel bound to reverse the judgment of the lower court simply because the Virginia court had overruled itself. The question before the Maryland court would be solely whether the statute of Maryland had been properly construed.

Of course, in the above situation, the Maryland and Virginia courts would not be functioning as coordinate courts. The Maryland court would not be bound in any event to follow the Virginia court's interpretation of the Virginia statute. It would do so entirely as a matter of attempting to discover the intent of the legislature in enacting the law. But we submit that what the Maryland court would do in such a situation is equally applicable to the problem in the instant case where we are dealing with a coordinate system of courts.

We do not question the power of federal reviewing courts to reverse a judgment of the lower court in view of a change of state law. That question is not before the court. We merely say that federal reviewing courts, exercising coordinate jurisdiction, *are not bound* to reverse the judgment of lower courts because of a change in the opinion of the state courts.

3. Clairvoyance of the Courts, and the Law of a State.

The Rules of Decision Act compels the federal courts in trials at common law to follow the state law where it is applicable. It is conceded in the instant case that the District Court did just that and complied with the mandate of the Act. Obviously, it cannot be held in error for having done so.

If a federal reviewing court should reverse the judgment of the lower court because of a change of the law of the state as a result of judicial decision and the construction of a state statute and constitutional provision, it could only be on the theory that the state law, which the District Court in the instant case concededly applied, was not in fact the law of the state. In other words, the reversal of the judgment of the lower court would have to be based upon the assumption that the overruling *Triff* case constituted the law of Ohio. Once we make this assumption, we get into a maze of difficulties as to what constitutes the law of a state under the Rules of Decision Act. Clearly, under such an assumption, the law which the Supreme Court of Ohio had repeatedly declared and which the District Court followed was not the law of Ohio, despite successive decisions on that question by the Ohio Supreme Court.

Now if the District Court can at this point be informed that the state court decisions, which it followed, were not the law of Ohio, the District Court at the time that it exercises jurisdiction over the cause can likewise conclude that those decisions are not the law of Ohio even though they have not been overruled, because of the possibility that they may be overruled. The District Court can thus speculate on the ultimate determination of state law, and in fact can undertake to predict what the state law would be.

We believe that any such assumption or possibility places an undue temptation in the hands of District Judges to disregard the Rules of Decision Act to an even greater extent than they were permitted to do under the doctrine of *Swift vs. Tyson.* The lower federal courts may simply ignore the decisions of the state courts on the theory, not of *Swift vs. Tyson* that they do not constitute statute law, but on the theory that they are erroneous and do not declare the state law as it should be, and that they will be overruled. That such an attitude on the part of the District Courts would not be inconceivable and in fact would even be legitimate has been repeatedly pointed out. We need refer only to an article by Dean Stimson *"Swift vs. Tyson, What Remains," 1938, 24 Cornell Law Quarterly, 54.*

The writer there deals with the problem which has frequently confronted the courts, namely, the true meaning of the term "law." Does a judicial decision determine the law, or does it merely declare the law which is presumed to have had some platonic, ideal pre-existence. If the latter, then of course an overruled decision is not law and never was law; *and the Rules of Decision Act could not compel the court to follow it even before it was overruled.* If, on the other hand, the overruled decision is law until it is overruled, then it would seem that the judgment of a District Court, which has correctly applied the law of the state, should not be reversed simply because the state law is changed. Moreover, if the overruled decision is law until it is overruled (See *e. g., Great Northern Railway Co. vs. Sunburst Oil & Refining Co.,* 287 U. S. 358, at 364), then the overruling decision will likewise be law only until it is overruled. And it would be absurd to change a judgment of a court exercising coordinate jurisdiction simply because the state court *temporarily* determines the law to be other than it formerly was.

The question resolves itself into this. If a decision of the state courts, construing state statutes and constitutional provisions, constitutes the law of the state until it is overruled, then the judgments of the federal courts applying that state law should not be tampered with because the state decisions are subsequently overruled. If, on the other hand, the overruled decisions never constituted the law of the state, then even before their overruling they were not the law of the state and the federal courts would be free to disregard them. In the latter case, the Rules of Decision Act would become a mockery and less effective than it was under the doctrine of *Swift vs. Tyson*. Hence, this court cannot say that the overruled state decisions did not constitute the law of the state and yet compel the District Courts to follow them prior to their overruling. This would be a sheer anomaly, an utter paradox.

It will naturally be asked how the District Courts, in view of the Rules of Decision Act, could ignore the overruled state decisions prior to their overruling. This question has been dealt with by Dean Stimson in the article above referred to. The writer, in fact, even goes so far as to *advocate* a lower court's disregarding of decisions which it deems erroneous even in a single integrated system of courts. The writer takes the position that if an overruled decision never constituted the law of a state, then a trial court of the state would not consider itself bound to follow decisions of the ultimate reviewing court of the state which it felt were palpably erroneous and would be overruled.

Of course, if the lower court in an integrated system of courts could take that position, it would be an *a fortiori* case for the federal courts exercising diversity of citizenship jurisdiction to disregard state decisions and thus nullify the Rules of Decision Act. The confusion that would result from such an attitude on the part of any courts would

be boundless, and the consequences of such an assumption must no doubt startle this court.

4. Litigant in Federal Courts Unable to Attack Overruling State Decision.

We have conceded that as a general proposition, the judgment in the instant case would be reversed if we were not dealing with a coordinate system of courts (but see the *Gilday* case, page 43, *supra*); in other words, if the judgment now before the court had been rendered by a state court on a purely state question. If after the judgment of a lower state court in such a case the Supreme Court of the state overruled its earlier decisions and construed the Workmen's Compensation Act and Constitution in such a manner as to make the judgment of the lower state court erroneous if rendered subsequently to the overruling state decision, the judgment of the lower state court would no doubt be reversed.

The reason for this is obvious, and the reason itself shows that the distinction, which we draw between that situation and the instant case, is a sound one and that a different result should be reached in the instant case. The reason, of course, is that if the judgment now before the court had been rendered by a lower state court, and were reversed in view of the overruling of earlier state decisions, the losing party on the reversal could still take an appeal to the state Supreme Court and seek to overthrow the overruling decision and convince the state court that it had erred in overruling itself. In other words, the question of state law would not be finally determined as against the party who had obtained judgment in the trial court. The question of state law would still be open to him.

Furthermore, even if the state Supreme Court refused to reconsider its overruling decision and affirmed a reversal

by an intermediate court of the judgment of the lower court, the party against whom the judgment was reversed could still seek review in this court of the effect of the overruling decision on his rights as a federal matter. He could contend, for example, that he had been deprived of due process of law, of the equal protection of the laws, or that his contract rights had been violated. In general, he could raise any federal question with respect to the effect of the overruling decision on his rights as a litigant, even though, as we have pointed out, a mere change of judicial decision does not constitute a denial of equal protection or due process or a violation of the contract clause. *His complaint would* not *be* against the change of judicial decision, but *against the effect of the "new" state law on his substantive rights;* and if a substantial federal question could be pointed out to this court, this court would undertake to review the judgment which was reversed because of the state's overruling its earlier decisions.

These rights, which a litigant would have in a single system of courts, namely: (1) directly to attack in the state Supreme Court the overruling state decision, and (2) to seek a review in this court on federal questions of the effect of the state law as determined against him on his substantive rights—these rights are not open to a litigant in the federal courts in a diversity of citizenship case.

In *Tidal Oil Co. vs. Flanagan,* 263 U. S. 444, 452 (1924), the court pointed out that no federal question would be presented by a case involving state law in which the state court applied a prior overruling state decision; and the same would seem true if the federal courts were bound to follow the overruling state decision. If the *Triff* case is erroneous as a determination of the law of Ohio, the defendant in the instant case and litigants in general in the federal courts have no means of attacking that error directly; for the federal trial courts are bound by the *Triff*

case from the date of its decision until it is overruled, *i. e.* in all common law causes which are presented to them after the date of the *Triff* decision. Nor can the defendant in the instant case or litigants in general in the federal courts raise the various federal questions that might affect their rights which would be open to a litigant on direct review by this court of a judgment of the state courts.

In other words, a retroactive application of the *Triff* case to the judgment of the lower courts in the instant case would be giving effect to a decision between strangers which the defendant in the instant case has had no opportunity to attack.

In the *Milwaukee E. R. & L. Co.* case, 252 U. S. at 106, this court, speaking through Mr. Justice Brandeis, said:

> "* * * the company seeks here to base rights on a later decision *between strangers,* which, it alleges, is irreconcilable on a matter of law with a decision theretofore rendered against it. *The contention is clearly unsound.*" (Italics ours.)

In *Ohio L. Ins. etc. vs Debolt,* 16 How. at 432, this court said:

> "* * * The writ of error to a state court would be no protection to a contract, if we were bound to follow the judgment which the state court had given, and which the writ of error brings up for revision here."

In the above two cases, this court made the same observation that we make, namely, that the federal courts, in diversity of citizenship matters especially, cannot give retroactive effect to and are not bound by an overruling state decision rendered subsequently to the judgment of the federal court, because to give such retroactive effect to the overruling decision would deprive the federal litigant of the right to test the validity of the overruling state decision

in this court on writ of error, or, under the present practice, by appeal or *certiorari*. The overruling state decision is clearly not binding on a federal litigant because it is a matter that affects strangers and which the federal litigant has had no opportunity to contest and can not contest in this court.

We also call the court's attention to the case of *Bucher vs. Cheshire Railroad Co.*, 125 U. S. 555 (1888). The court there refused even to give effect to a remedial statute of Massachusetts, which, so far as the opinion of the court discloses, antedated not only the judgment of the lower federal court but even the filing of suit therein. The case involved suit against a railroad for personal injuries. The defense was that the plaintiff had violated a Massachusetts statute prohibiting travel on Sunday. The highest court of Massachusetts had construed the statute at the time the injury occurred as affording a defense in a civil case. Subsequently, the Massachusetts Legislature enacted an amendatory statute providing that violation of the statute should not constitute a defense in a civil action. The amendatory act was passed after the injury, but prior to the bringing of suit in the federal court. The amendatory act was clearly an attempt on the part of the Legislature to "overrule" the construction of the former statute by the Supreme Judicial Court of Massachusetts, which held that violation of the statute did constitute a defense in a civil action. This Court, although it strongly disapproved the construction of the first statute by the Massachusetts court, refused to give effect to the amendatory statute although the statute was plainly remedial in character and was in fact an expression of the Legislature that the Massachusetts court had misconstrued the first statute.

5. Statute versus Decision.

Although as we have seen, a statute may be clearly retroactive, it is generally said that an act of the legislature is prospective in character, but that the judgment of a court is retroactive. As a general proposition, this is certainly true, since judgments and decisions of courts are usually clarifying or declaratory in nature. They merely seek to discover certain eternal principles of law which are deemed to be based upon perennial principles of right and justice, and were always in existence, and are presumed to have regulated and determined the relations of parties in the social order.

We do not wish to go into an elaborate discussion of the nature of legislation and judicial action with respect to their prospective or retroactive character. We do wish to point out, however, that even though a judgment, when it is clarifying or declaratory, may be retroactive in its effect, nevertheless, when that judgment or decision overrules former decisions, especially in respect of statutory and constitutional provisions, it should be deemed entirely prospective in its operation (cf. *Great Northern Railway Co. vs. Sunburst Oil & Refining Co.*, 287 U. S. at 364.* This is particularly true when we are dealing with the effect or bearing of such overruling decisions on the judgments of courts in a coordinate system of courts exercising parallel jurisdiction to that of the governing body whose statute, constitution or judicial decision is involved. The reason for this derives from the fact, which we have discussed above, that the parties litigant in the court, which exercises coordinate jurisdiction, have had no part in assisting the other court in determining what the over-

* Mr. Justice Holmes long ago pointed out that all decisions are in part legislative in nature. *This is certainly true of overruling decisions.* They should, therefore, be given the same prospective effect that is generally ascribed to legislation.

ruling judgment should be. That judgment is entirely between strangers.

A statute, on the other hand, represents a deliberate attempt of the legislature to deal with all the members of the social body within the jurisdiction and under the control of the legislature. It applies to all members of the governmental unit which has entrusted the making of its laws to the legislature. Whether the statute is prospective or retroactive in its operation, the legislature, by the very act of legislating, attempts to regulate the relations of all the parties subject to its control and supervision. All parties, who are citizens or members of the governmental unit represented by the legislature, have an opportunity to express their sentiments either for or against the enactment of a proposed law. It is utterly impossible to do this with respect to judicial decisions. A statute, whether it be prospective or retroactive, seeks to regulate and determine the conduct not only of A and B and C and D, but also X and Y, and the thousands or millions of other citizens of the sovereign state.

Judicial action, on the other hand, although it seeks to lay down universally applicable rules of law in accord with the court's understanding of right and justice, does not, in litigation between A and B, even consider or attempt to deal with the effect of the disposition of that litigation on the rights of X and Y, whether X and Y be presently engaged in litigation or not. If the litigation between A and B should involve certain contract or tort rights, and X and Y should subsequently come into a relationship involving identical or similar contract or tort rights, then, of course, the principles of law, which the court has laid down in the litigation between A and B involving such rights, will become applicable to the relationship between X and Y. If, however, X and Y have already come into the relationship involving those contract or tort

rights, and have had no opportunity to aid the court in determining what the disposition of the litigation between A and B should be, it is fundamentally unjust, *especially in matters of statutory and constitutional construction,* and *especially when we are dealing with a coordinate system of courts,* and *especially when the judgment between A and B involves an overruling of earlier decisions,* that the action of the court in the suit between A and B should have any bearing or effect upon the rights of X and Y which have already accrued.

An act of the legislature is thus not only usually prospective in nature, but it is clearly general in application. It applies to all parties. Judicial action, on the other hand, is clearly particularistic in its nature and should be so in its effect.

In the *Westinghouse Air Brake Co.* case, 137 Fed. at 35, the Circuit Court of Appeals for the Eighth Circuit said with respect to a situation almost identical to that with which we are dealing:

> "* * * *An ex post facto change of the law by construction is as vicious as by legislation.*" (Italics ours.)

This court spoke to the same effect in *Chicago vs. Sheldon,* 9 Wall. at 55 to 56:

> "* * * A contract having been entered into between the parties, valid at the time, by the laws of the state, it is not competent even for its Legislature to pass an Act impairing its obligation, *much less could any decision of its courts have that effect.*" (Italics ours.)

As this court in the *Debolt* case, 16 How. at 432, said, when speaking of the effect of a change of law by judicial decision on contract rights that had accrued:

"* * * its validity and obligation cannot be impaired by any subsequent act of the Legislature of the state, *or decision of its courts,* altering the construction of the law." (Italics ours.)

As the court said in the *Gilday* case (*supra,* p. 44):

"* * * A statutory *or judicial change* of the law is prospective and not retroactive * * *" (Italics ours.)

6. Tort versus Other Rights.

Plaintiff points out that she seeks damages for occupational diseases, in other words, that this is a tort case. She seeks to distinguish all the authorities which we have cited, as not involving tort questions but dealing solely with matters of contract, property, and various statutory constitutional questions.

Frankly, we do not grasp the significance of this distinction on which plaintiff seeks to focus the court's attention. The District Court, in the instant case, was bound to follow the law of Ohio at the time it rendered judgment, whether the question before it were one of contract, tort, property, or any other conceivable interest. If plaintiff, under the state law at that time, had no rights or remedy against the defendant, it is absolutely immaterial whether her claim be in contract, tort, or otherwise. If, on the other hand, before plaintiff had brought suit in the federal court, the applicable state law had been changed by judicial decision so that the federal court, on the filing of suit therein, would be compelled, under the Judiciary Act, to recognize plaintiff's rights newly acquired in view of the judicial change of the state law, the District Court would have done so whether such newly acquired rights were in contract, tort, or any other field of the law.

The point, therefore, in the instant case, is not the nature of plaintiff's suit and the remedy sought, but solely

whether the change of state law by judicial decision and statutory construction shall operate retroactively on the federal courts.

There is this much, however, to be said with respect to plaintiff's insistence that this is a tort case: At the time that plaintiff entered into employment with the defendant, as set forth in the petition, the law of Ohio had been unequivocally settled by the supreme court of that state. That law denied to the plaintiff, and all other employees, any remedy at commonlaw for noncompensable occupational diseases.

It may threfore be said that the law of Ohio, at the time that plaintiff entered upon her employment with the defendant, became a part of plaintiff's contract of employment. By entering into the defendant't employ, plaintiff in effect agreed to place herself solely under the Ohio Workmen's Compensation Act for all injuries or occupational disease suffered in the course of her employment, and to waive or forego, in accordance with the state law so well understood and settled, any and all claims for compensation at common law for noncompensable occupational diseases. The reading of this law of the State of Ohio into the contract of employment furnishes further ground for defendant's contention that the overruling decision of the Ohio court should have no retroactive effect on the federal judgment.

This court has pointed out that such overruling, by statutory construction, of the earlier law of a state by the court of last resort of the state, does not constitute a violation of the contract clause of the federal constitution (*Tidal Oil Co. vs. Flanigan*, 263 U. S. 444, 451 (1924). But this court has repeatedly held that such overruling state decisions do not have a retroactive effect upon a federal judgment which followed the earlier decisions of the state court. In diversity of citizenship causes, this court has so held in

the cases which we have cited above at page 19-20. Other cases so holding are *Chicago vs. Sheldon, Ohio Life Insurance & Trust Co. vs. Debolt,* both *supra.*

7. Ex Post Facto Law.

Under the law of Ohio as it existed at the time of plaintiff's alleged injury, and also by virtue of the contract of employment of which the state law became a part, defendant had a vested right of immunity from suits at common law for a noncompensable occupational disease. Subsequently, the law of the state was changed by statutory construction through judicial decision. If the change of state law is to be made applicable to the former immunity of the defendant so as to render it liable to the plaintiff, the change of state law *in effect* constitutes an *ex post facto* law within the *spirit* of the Constitution.

We are, of course, aware that the *ex post facto* clause has been repeatedly held to apply only to criminal statutes. We wish to point out, however, that in their origin, tort and crime were one and the same thing. In the very early common law, the tort of assault and battery, if it were such, constituted the crime of assault and battery.

Now there is no question but what, if a defendant had assaulted and "beaten up" a plaintiff prior to the time when the crime of assault and battery was recognized in the common law courts, the defendant could not thereafter be prosecuted for that crime merely because the courts had subsequently recognized the crime and given it effect prior to the prosecution. We believe that at that very early stage of the common law when the crime of assault and battery was first recognized, the common law courts would likewise have given no civil relief to a plaintiff for the act of assault and battery, for the same reason that they would refuse to

hold a defendant criminally guilty for what had become a crime after the act.

Similarly, at the time of plaintiff's alleged injury in the case at bar, the defendant, under the state law as it had been construed and settled by the Supreme Court of Ohio, was liable neither criminally nor civilly for any negligence of which it may have been guilty towards the plaintiff. Obviously, the legislature could not, after the alleged injury, either under the Ohio or the Federal Constitution, enact a statute creating the alleged negligence of the defendant a crime in the State of Ohio. If the legislature itself were powerless to create a crime for a past act, it would seem to be an *a fortiori* case that the Supreme Court of Ohio could not make the alleged negligence of the defendant towards the plaintiff a crime after the act. It would seem just as obvious that neither the legislature nor the Supreme Court of Ohio could, by a retroactive statute or judicial decision, make the alleged negligence of the defendant a tort when it was not such at the time that it allegedly occurred.

We are convinced that, both in matters of tort and crime, it is thoroughly unlawful and fundamentally unjust to create a liability either by statute or judicial decision for an act of either negligence or intent which was lawful at the time the act was committed. Whether this principle that we urge upon the court's consideration is covered by the *ex post facto* provision of the Constitution is immaterial. It must appeal to the court's sense of justness and fairness to realize the gross injustice of holding a defendant liable for conduct which in all respects conformed to the law as it existed at the time of the conduct merely because, by judicial construction, that law has been changed through the action of a court.

8. Finality of Judgment.

Plaintiff insists that, because the case at bar was pending on appeal when the law of Ohio was changed by judicial decision, the judgment of the District Court is not final and therefore should be reversed in view of the change in state law. It is certainly true that, for purposes of appeal, the judgment is not final. This observation, however, entirely fails to dispose of the problem. The question is whether, when the District Court followed the law of Ohio in accordance with the mandate of the Judiciary Act and entered a judgment which was correct at the time, that judgment should be reversed because of a subsequent change of state law by judicial decision. In other words, the question is whether a state court, by changing its own principles of decision, can compel the federal courts, exercising coordinate jurisdiction in a parallel judicial system, to change their judgments, whether final or not in an ultimate sense, because of this shift in opinion of the state court.

If the mere lack of finality of the judgment of the federal court because of the appeal could be considered a factor in inducing the federal courts to change a correct judgment because of a later change of state law, then, as the patristic writings say, *there would be no end to the matter.* If the plaintiff is correct that an appeal prevents the judgment from becoming final, so that it is subject to reversal because of a change in the opinion of a coordinate system of courts, then, by a parity of reasoning, a judgment of the District Court which *had* become final because not appealed could be vacated within term if the District Court's attention were called to an overruling state decision which had been rendered subsequently to the federal judgment. Similarly, if a federal judgment had become final in the plaintiff's sense because no appeal was taken therefrom, or even

if it had become final after decision on *certiorari*, still if a bill of review or whatever is its current counterpart could be presented, showing that the applicable state law had been changed by judicial decision, then there would likewise be reason for changing the judgment of the federal courts.

The Circuit Court of Appeals for the Sixth Circuit in *Board of Councilmen of Frankfort vs. Deposit Bank, supra*, p. 26-8, expressly held in the latter situation that this could not be done. No emphasis was placed by the court on the fact that the judgment was final. The sole ground of decision was that the federal courts cannot be compelled to change their judgments simply to conform to the law of another jurisdiction where that law has changed after the judgment was rendered.

This tampering with the judgments of a court in one branch of a coordinate system of the courts because of changing judgments in another branch of that system should not be countenanced, whether the judgment be regarded as final or not. The sole question is whether the federal court has applied the law of the state as required by the Judiciary Act.

9. Law vs. Justice.

Long ago Mr. Justice Holmes pointed out that concepts of law and justice do not always run parallel; that the expressions of the legal sentiment of a people may be in advance of or behind the same people's conceptions of right and wrong in a moral or ethical sense. Ordinarily, however, the expressions of the legal sentiment of a people by its legislature or court of last resort are harmonious with its moral sense of right and wrong. This court has made a strenuous effort within the last few years to adjust the legal sentiments of the people of this country to their innate sense of justice.

Now, the legal principles upon which the judgment of the Circuit Court of Appeals is based are thoroughly in accord with what the people of this country will sense as the justice of the matter and as in harmony with their feeling of right and wrong. The plaintiff chose the federal court as her forum. She knew that, in so doing, she was submitting to the justice and discretion of the federal court. She knew that she was asking a court in a coordinate system of courts to pass judgment upon her alleged cause of action. She knew also that no state court could compel the federal court to decide her case in any particular way except in so far as the court was bound by the Rules of Decision Act. In other words, she was well aware that she was asking an entirely independent court, outside and beyond the control of the integrated state system of courts, to pass upon her alleged cause of action, which was claimed to have arisen within the State of Ohio.

Plaintiff asked the federal court to render judgment upon that cause of action. She has had her day in court. The District Court rendered judgment in accordance with the law of Ohio, as it was required to do. Now plaintiff is asking, first the Circuit Court of Appeals and then this court, to give her another day in court and to reverse the judgment of the District Court simply because the Supreme Court of Ohio, in its infinite wisdom, has decided to abandon the law which the District Court was required to follow. The plaintiff asks the court to do this even though the federal courts have had no part in the overruling of the earlier state law and even though the defendant has had no opportunity, and can in the federal courts have no opportunity, to present to the Supreme Court of Ohio objections to its overruling the earlier law of that state.

The sentiment of bench and bar on this request of the plaintiff is adequately expressed in the numerous decisions of this court which we have cited holding that there is no

substance to the plaintiff's position and that it is wholly unwarranted as a legal proposition. We believe those same decisions express the sentiment of both bench and bar on the matter as a question of justice and right and wrong. For over a hundred years the bench and bar of this country have concluded that there is not only no legal necessity, but likewise no moral imperative, to overthrow the judgments of a federal court simply because of a change of the applicable state law. We believe furthermore that, if the plaintiff's contention were put to any layman in this country, he would concede that the legal principles which have guided this court for over a century adequately express the moral sentiments and the sense of justice of the people of this country. Thus, we contend that, in the case at bar, there is no disparity between what is right as a legal proposition and what is right as a principle of justice and ethics.

If, however, the court, for one reason or another, should be at all disposed to question the validity of the legal principles which have guided this court for over a century, we wish to point out that the overwhelming justice of the matter supports the defendant's position. In disposing of this case, the court should not only consider that it will be laying down principles of law uniformly applicable in the future to all similar litigation, but the court should also decide this case *as a controversy between two parties,* the plaintiff and defendant, in accordance with principles of right and justice.

This is not a removal case. The defendant is a resident of the State of Ohio. Suit was not first brought in the state courts and then removed to the federal court in order to obtain a more favorable decision. It is the plaintiff who is a non-resident of Ohio, and it is the plaintiff who chose the federal forum for her cause of action. The reasons for this we pointed out to the court in our brief opposing the petition for *certiorari,* and we merely advert to them briefly.

Messrs. Smith and Sutherland, counsel for plaintiff in the instant case, had represented numerous litigants in identical cases in the state courts. In at least five of such cases (p. 9, *supra*), they had been unsuccessful and the petitions dismissed because the law of Ohio then barred all common law relief for noncompensable occupational diseases, even though allegedly caused by the negligence of the employer. After making such valiant efforts for their clients, it was only natural that counsel for plaintiff in the instant case should resort to another forum to "try their luck" for the plaintiff. That forum was the federal court.

That they sought a more favorable decision from the federal courts than they had obtained for other clients in the state courts is apparent from the assignments of error which they filed in both the District Court and the Circuit Court of Appeals. The eighth specification of error which plaintiff assigned as ground for reversal of the judgment was that the court had erred

> "By failing to hold that the federal courts may follow the common law and that they are not bound by the state courts or state rules in cases where the jurisdiction of the federal court rests upon a diversity of citizenship, as in this case." (R. 10.)

Similarly, the ninth specification of error which the plaintiff assigned was

> "that the right to a general federal common law is a derivative right of the federal court system and is not a power reserved to the states by the tenth amendment." (R. 10.)

Thus, by filing suit in the federal court, plaintiff and her counsel hoped to have the federal court disregard the law of Ohio as it concededly (see p. 4, *supra*) existed at the time suit was filed and judgment was entered. Plaintiff, a non-resident, sought to take herself out of and beyond the jurisdiction of the state courts, and the state

Workmen's Compensation Act and Constitution which they had construed. The remarkable thing about the assignments of error which we have just cited is that they were filed in the District Court August 24, 1938, which was but one day short of four months after this court had handed down the decision in *Erie vs. Tompkins* (April 25, 1938), in which it was held that the District Courts must follow the state law not only in matters of statutory construction and property law, but also in matters of common law.

The startling thing, therefore, is not only that plaintiff sought to obtain a more favorable decision than she could have obtained in the state courts; but even after this court had expressly held in the *Erie* case that the federal courts could not disregard the state law, plaintiff sought to have the Circuit Court of Appeals disregard and ignore the decision of this court in the *Erie* case!

Of course, the instant case never was within the rule of *Swift vs. Tyson,* because the law of Ohio depended upon the state court's construction of Article II, Section 35, of the Constitution of Ohio and the Workmen's Compensation Act of the state. But plaintiff apparently thought it was and thus sought to bring herself within it by selecting the Federal court as a forum.

Now we submit that when a nonresident seeks in this manner to disregard not only the law of the state which is applicable to the cause but also the important decision of this court in the *Erie* case, he is entitled to no sympathy, as a pure question of right and wrong, when the forum which he has selected gives him the only judgment which it can.

IV The Rules of Decision Act.

The Rules of Decision Act requires the federal courts *in trials at common law* to follow the applicable law of the state. Under that mandate of Congress, the district court

is powerless to do otherwise. And this court has held in the *Erie* case that the mandate of Congress applies to the now obsolete questions of "general" law as well as to purely local matters. In the instant case, the district court did follow the mandate of the Rules of Decision Act. It would now be anomalous to hold it in error for having done so.

The Rules of Decision Act does not govern the action of the Circuit Court of Appeals or of this court. It applies only to *trials at common law.* It is not applicable to appeals in the Circuit Court of Appeals or to the jurisdiction of this court or *certiorari.* Section 34 of the Judiciary Act is perfectly explicit in this respect.

Probably the reason that it does not apply to appeals or the jurisdiction of this court on *certiorari* is that neither an appeal nor the granting of *certiorari* is guaranteed in the federal system. Apart from the question whether Congress could constitutionally deny an appeal to a litigant, there is no question but that Congress can fix the time within which an appeal may be taken. If, after the rendition of the judgment in the district court, the time for appeal to the Circuit Court of Appeals had expired, certainly the plaintiff would have had no cause for complaint and the judgment would have had to remain final and not subject to change, whether by vacation or a bill of review. *Board of Councilmen vs. Deposit Bank, supra.*

This is particularly true in the instant case. Plaintiff contended, both in the Circuit Court of Appeals and in this court, that she had no financial means to take an appeal from the judgment of the district court; and therefore she asked leave to proceed *in forma pauperis.* It is well settled that, in order to proceed in *forma pauperis,* there must be a showing of merit in the party's case, whether in the trial court or on appeal.

Fisher vs. Cushman, 99 F. (2d) 918 (C. C. A. 9th, 1938);

Phillips vs. McCaulely, 92 F. (2d) 790 (C. C. A. 9th, 1937);

Lambert vs. Central Bank, 85 F. (2d) 954 (C. C. A. 9th, 1936); cert. den. 300 U. S. 658.

At the time that plaintiff asked leave of the District Court to proceed further *in forma pauperis*, there was no merit in her case and there could have been no showing of merit that would warrant an appeal as a prerequisite of the court's allowing her to proceed *in forma pauperis*. The judgment rendered by the District Court was, as plaintiff herself has conceded (see page 4, *supra*), in accord with the law of Ohio as it then existed. This court had already decided the *Erie* case when the plaintiff requested leave to proceed further *in forma pauperis*. Hence, as we have pointed out above, there was no basis whatever for plaintiff's contention that the federal courts should disregard the state law and follow a general federal common law.

The only question which plaintiff could seek to have the Circuit Court of Appeals review was the constitutional question that the Ohio law, as applied by the District Court in accordance with the decisions of the Supreme Court of Ohio, deprived plaintiff of any and all remedy for her alleged injury. As we shall show, however, in the third point of our argument, this constitutional question was so well settled against plaintiff's contentions that in an identical case brought by the same counsel who represent plaintiff in this case, this court had dismissed an appeal from the Supreme Court of Ohio on the ground that no federal question was presented. *Mozingo vs. Marion Steam Shovel Co.*, 298 U. S. 645 (June, 1936). The same counsel, not being content with two hearings of that case in the

Supreme Court of Ohio and one hearing in this court and the dismissal of the case for want of a substantial federal question, petitioned for a rehearing in this court. That petition was likewise denied, *298 U. S. 645 (October, 1936)*.

In other words, at the time plaintiff asked leave to appeal and to proceed further *in forma pauperis*, there was *no showing of merit* in her case and there could be none because every question raised by plaintiff had been disposed of by the District Court exactly in accordance with the law of Ohio, and with the decisions of this court on the single federal question.

Defendant has gone along with the plaintiff in every respect and has presented no obstacles to her proceeding *in forma pauperis*, or in any other manner. Had defendant or the District Court insisted that plaintiff make a showing of merit in her case in order to proceed *in forma pauperis*, it is apparent that under the allegations of plaintiff's poverty affidavit (R. 7 to 8), she could not have perfected her appeal and would have had to rest content with the judgment of the District Court. Under this state of the record, we believe that the judgment of the District Court cannot be assailed merely because the Ohio court has overruled itself.

V Triff Case Is Not Settled Law of Ohio.

In numerous cases, even when dealing with clarifying and declaraotry decisions of state courts rendered subsequently to a federal judgment, this court has held that although it may consider such subsequent decisions and their effect upon a federal judgment correct at the time it was rendered, nevertheless when such decisions do not represent the *settled* law of the state, it will refuse to follow them. Now, as we have pointed out above, page 12-3 the consolidated *Triff* case, which is the one involved in

the case at bar, does not represent the settled law of Ohio. Quite apart from the fact that it was decided by a bare majority of 4 to 3, and quite apart from the fact that the personnel of the court has significantly changed since that decision was rendered, the case of *Smith vs. Lau*, which was part of the consolidated *Triff* decision, is still pending and has in fact not been tried in the courts of Ohio. The defendant in that case may still appeal to the Supreme Court of Ohio any decision rendered by the Common Pleas Court therein and may in this manner be successful in attacking the soundness of the *Triff* case.

This court, of course, cannot inquire independently into the soundness of the *Triff* case, nor need this court speculate on the success of the defendant in *Smith vs. Lau* in attacking the *Triff* decision when the *Smith* case is tried and appealed. But it seems to us from the mere existence and continuance of the controversy in that case that the result reached by the Ohio Supreme Court in the *Triff* case is a wide open question which, especially in view of the change in personnel of the court, is very apt to be overruled and set aside. Apart, therefore, from the question whether this court *need* apply the *Triff* decision to the judgment of the federal court, we believe that this court certainly *should not* apply the *Triff* decision, for it does not represent the settled law of Ohio.

VI Duty vs. Power of Federal Court.

We have carefully eschewed going into the question whether the federal courts under the Rules of Decision Act, under the federal constitution, or for any other reason, have the power to change the judgment of a lower court, right when rendered, to conform to a subsequent overruling decision of the state court. That question is not before the court. The sole question is whether, even

though the federal courts may have such power, they are *required* or obligated to conform a judgment in a diversity of citizenship case, right at the time of its rendition, to a subsequent overruling decision of the state court. The question is not whether the Circuit Court of Appeals and this court *can* reverse the judgment of the District Court, but whether they *should* or will do so. The authorities and the numerous reasons, which we have set forth above, answer this question in the negative.

VII The Constitutional Question in the Erie Case

1. In *Erie Railroad Co. vs. Tompkins,* this court not only overruled the case of *Swift vs. Tyson* as a question of statutory construction of the Rules of Decision Act, but the court likewise broadly "held" that the Rules of Decision Act was simply declaratory of the judicial power of the federal courts under Article III of the Constitution, and that even in the absence of the Rules of Decision Act, the result would necessarily be the same. The court "held" that the federal courts have no power to disregard the decisions of the state's highest tribunal whether in matters of common law or statutory and constitutional construction.

Before we discuss this determination of the constitutional question, we may say that for the purposes of the case at bar, everything that was both said and decided in the *Erie* case may be accepted as the principle of law governing the disposition of this case. The *Erie* case still does not require a reversal of the judgment of the District Court or the Circuit Court of Appeals.

Even assuming that the Rules of Decision Act is merely declaratory and that the result would be the same in the absence of that statute, it should be clear that this limited construction of the power of the federal courts

applies in any event only to trials at common law. Appeals are not constitutionally or by statute guaranteed to litigants (see page 96 *supra*). This is particularly true of appeals taken *in forma pauperis* (see page 97 *supra*). Even if the District Court had no constitutional power to disregard the decisions of the Supreme Court of Ohio, still the Circuit Court of Appeals was not bound to reverse the judgment of the District Court merely because of a change of decision by the Ohio Supreme Court. The Circuit Court of Appeals was not even bound to entertain an appeal from the judgment of the District Court. If the plaintiff had permitted the time for appeal to expire, concededly no relief from the judgment of the District Court would have been available to her. Likewise, if the defendant had pointed out to the District Court or the District Court itself had concluded that there was no merit in the plaintiff's appeal and that there could be no showing of merit, the plaintiff, if the allegations of her poverty affidavit are to be accepted as true, could not have taken an appeal even before the time for appeal had expired; and the judgment would have been unassailable.

Similarly, let us suppose that the consolidated *Triff* case had been decided by the Supreme Court of Ohio after the Circuit Court of Appeals had affirmed the judgment of the District Court and plaintiff had then brought a petition for *certiorari*. If the *Triff* case were decided after the three months' period for the filing of a petition for *certiorari*, of course, the plaintiff could have obtained no review by this court and no application of the *Triff* decision to the federal judgment even as a matter of privilege. But even if the *Triff* case had been decided within the three months' period, plaintiff would have no certainty that this court would grant *certiorari* and apply the *Triff* decision to the federal judgment, for *certiorari* is a matter of privilege and not of right.

We, therefore, point out that both as a matter of law and as a practical question of procedure, *federal reviewing courts* are by the express terms of the Rules of Decision Act not bound thereby and cannot be bound by any constitutional limitation on the power of the lower courts even in the absence of a Rules of Decision Act.

2. Constitutional "Decision" in Erie Case Is Erroneous.

Under the authority of certain investigations and discoveries made by Mr. Charles Warren (37 *Harv. L. Rev.* 49), this court in the *Erie* case overruled the century-old case of *Swift vs. Tyson*. The discoveries of Mr. Warren disclosed that the Rules of Decision Act, as it now reads, and as it was incorporated into the first Judiciary Act, intended to require the federal courts to follow the decisions of the state courts both in matters of common law and in matters of purely local law. As Mr. Justice Butler pointed out in his "dissenting" opinion in the *Erie* case, there was no argument in this court on the question of the soundness or validity of the conclusions reached by Mr. Warren and adopted by this court in the *Erie* case. Nevertheless, we accept the *decision* in the *Erie* case as the irrevocable construction by this court of the Rules of Decision Act.

Swift vs. Tyson was wrong in construing that Act to apply only to purely local law. The amendment of the draft of the Rules of Decision Act unearthed by Mr. Warren discloses the intent of Congress to require the federal courts to follow the state tribunals in diversity of citizenship cases even in matters of "general" law. We, therefore, accept the *decision* in the *Erie* case in overruling *Swift vs. Tyson* as unalterable and as binding upon the lower federal courts.

If, however, this court should be disposed to consider what was said on the constitutional question in the *Erie* case as going beyond the express language of the Rules of Decision Act ("in trials at common law") and as binding even on federal reviewing courts so as to require them to conform in diversity of citizenship cases to the decisions of the state courts every time those decisions change, we wish to review what was said on that question and to ask the court to modify what was there said if the court deems it necessary for the disposition of this case.

If we may paraphrase the Fifty-First Psalm, our position is that the constitutional "decision" in the *Erie* case was *conceived in error and begotten in disregard and in violation of the express language of Article III of the Constitution of the United States*, the source of the federal judicial power. There is no basis in either law or fact for the interpretation given to Article III of the Constitution, by this court in the *Erie* case or for the imposition of that limitation on the judicial power conferred by Article III. The judicial power is not limited by Article III. The Rules of Decision Act is not declaratory, but is a limitation imposed upon the judicial power which is conferred by Article III. Mr. Justice Reed, in his concurring opinion in the *Erie* case, was of the same opinion. In the following argument we shall prove that Mr. Justice Reed was right, that the Rules of Decision Act is not declaratory of Article III of the Constitution, but is a limitation thereon, and that whatever was said or decided as a constitutional matter in the *Erie* case was, as we repeat, conceived in error and begotten in "constitutional sin."

(a) The Rules of Decision Act is part of the first Judiciary Act passed by the first Congress in 1789. This court has pointed out in *Wisconsin vs. Pelican Insurance Co.*, 127 U. S. 265, 297 (1888) that the Judiciary Act was "passed by the first Congress assembled under the Con-

stitution, many of whose members had taken part in framing that instrument, *and is contemporaneous and weighty evidence of its true meaning.*" (Italics ours.) The whole Judiciary Act was passed two years after the federal Constitutional Convention of 1787. The committee of the Senate, which drafted the Judiciary Act, had among its ten members five who had served in the federal Convention of 1787 and were familiar with its intent as to the judiciary: Ellsworth, Paterson, Strong, Few and Wingate. (See Warren, op. cit. *37 Harv. L. Rev. 49, 57*). Of these members of the committee, Few, of Georgia, and Paterson, of New Jersey, were signers of the Constitution.

According to Mr. Warren, op. cit. page 85, the modification of the draft of the Rules of Decision Act, which Congress incorporated into the Judiciary Act, was in Ellsworth's handwriting and was prepared by him. Ellsworth had been a member of the Constitutional Convention. The draft of the whole Act was prepared by Paterson, Ellsworth and Strong, all members of the Constitutional Convention (Warren, op. cit. page 50).*

Patterson, who was a member of the Senate Committee to draft the Act and in whose handwriting appear Sections 1 to 9 of the draft bill, was a member of the Constitutional Convention, a signer of the Constitution, and later an associate justice of this court.

The work of these eminent men on both the draft of the Act and the modification thereof, which was adopted by Congress, constitutes weighty evidence of the interpretation given to the Judiciary Article of the Constitution

* Mr. Warren there points out that the last sections of the Act from Section 25 on are in the handwriting of a recording clerk. This would of course include Section 34, the Rules of Decision Act. It is conceded, however, that Ellsworth had a large hand in the preparation of the whole draft of the Judiciary Act. Furthermore, it is clear that both the draft of Section 34 and the modification thereof were intended to be incorporated between Sections 11 and 12 of the Act (Warren, op. cit. 85 to 87, 50), so that even the original draft of Section 34 was probably written by the recording clerk at the instance or direction of Ellsworth, Patterson or Strong.

by the men who were responsible for its present form. And this court has given recognition to that fact in *Wisconsin vs. Pelican Insurance Co., supra.* Other weighty evidence of the meaning of the Judiciary Article of the Constitution will likewise be found in the writings of other contemporaries who expressed their opinions on that article. We shall hereinbelow set out some of these contemporary interpretations of the Judiciary Article.

(b) In their infinite wisdom, the members of the Judiciary Committee of the Senate, and likewise Congress, made the Rules of Decision Act applicable only to trials at common law. There must have been some reason for this in the minds of the men who were members of the Constitutional Convention and who were familiar with the contemporary interpretation placed upon the Judiciary Article of the Constitution after its adoption by the states. The Act by its express terms is inapplicable to trials or hearings in equity. This court has so held in *Russell vs. Todd,* 309 U. S. 280 (Jan. 26, 1940). The court there said:

> "The Rules of Decision Act does not apply to suits in equity. Section 34 * * * directing that the 'law of the several states' 'shall be regarded as rules of decision' in the courts of the United States, applies only to the rules of decision in 'trials at common law' in such courts * * *"

This omission of the First Congress, which was thoroughly familiar with the intent of the federal Convention with respect to the judiciary, and its failure to provide that the federal courts should follow the laws of the state in equity cases are extremely significant evidence of their failure to consider the Rules of Decision Act merely declaratory of the judicial powers of the federal courts.

To be sure, this court, in *Russell vs. Todd, supra,* in *Mason vs. United States,* 260 U. S. 545 (1923), and in *Ruhlin vs. New York L. Ins. Co.,* 304 U. S. 202 (1938), has

held that in equity matters the federal trial courts *should* follow the applicable state decisions. We believe that is correct. That, however, does not in anywise disparage our contention and the observations made by Mr. Justice Reed in his concurring opinion in the Erie case that the Rules of Decision Act is not declaratory of the Judiciary Article of the Constitution, but is a limitation thereon.

Whether or not this court would say that in the absence of such a provision in the Rules of Decision Act, the federal courts are nevertheless in equity matters required to follow the applicable state decisions, the fact remains that the First Congress did not deem it necessary so to provide. The First Congress knew what Article III of the Constitution meant and the powers that it conferred upon the federal courts. It had a large hand in giving that article its present form and shape. It was thoroughly familiar with its significance. The Rules of Decision Act, in failing to provide for equity cases, did not undergo the amendments and modifications that other sections of the draft bill underwent. Apparently, the only modification or amendment was that in Ellsworth's handwriting, which gave Section 34 its present form and changed the phrases "statute law * * * and their unwritten or common law * * *" into the phrase "laws of the several states."

If, therefore, the Rules of Decision Act is declaratory of the Judiciary Article of the Constitution even with respect to trials at common law, it would seem absurd that the First Congress should have failed to provide in a similar declaratory manner with respect to trials in equity.

When this court, in the *Russell, Mason* and *Ruhlin* cases, *supra*, holds that in equity cases the federal courts *should* follow the applicable states decisions, the court is wisely deciding in favor of uniformity within the jurisdiction of a state. But when the court says (if the constitutional "decision" in the *Erie* case can be so construed)

that the federal courts *must* follow the applicable state decisions in equity matters, it would seem that the court is imputing to the First Congress, thoroughly familiar as it was with the intent and significance of the Judiciary Article of the Constitution, both a negligent manner of drafting the Rules of Decision Act and likewise a futility of purpose in inserting into the Judiciary *Act* what was already inherent and implicit in the Judiciary Article of the Constitution. It is inconceivable that the First Congress should enact a declaratory Rules of Decision Act with respect to trials at common law and yet should so abysmally fail to provide a similar declaratory manner for trials in equity.

(c) The Rules of Decision Act is in fact a *limitation* on the Judiciary Article of the Constitution. If we accept the decision, theory, or whatever it be called, of this court in the *Erie* case with respect to the constitutional question, namely, that the Rules of Decision Act is declaratory and not a limitation, then we find that in the whole Judiciary Act, as finally adopted in 1789, there is only a single other declaratory provision. That is the section which deals with the equity powers of the federal courts. Section 16 of the draft bill and Section 16 of the Act (See *Warren,* op. cit. page 96). That section provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." We have just said that this section would be the only other section in the Act which is purely declaratory and not enabling or limitational. As a matter of fact, section 16 is declaratory not of the Judiciary Article of the Constitution, but of the power of courts of equity irrespective of and apart from the Judiciary Article of the Constitution. It is declaratory of the principles of the common law and not of any constitutional provision.

When we examine Section 16 of the Act, we find that there is abundant reason for its being declaratory of the principles of common law. The reason is found in Section 16 of the *draft bill* which provided:

> "that suits in equity shall not be sustained in either of the courts of the United States in any case where a remedy may be had at law." (Warren, op. cit. page 96.)

This section in the draft bill was clearly not declaratory of either the Judiciary Article of the Constitution or the principles of the common law. It was in fact an extension of the powers of equity courts as they existed under the common law system prior to the adoption of the Constitution. Whether such an extension of the powers of equity courts would have been valid in view of the failure of the Constitution to provide for jury trial in civil cases is immaterial The fact remains that the draft bill of the Judiciary Act containing Section 16, which was submitted to the Senate, attempted or purported to, or in fact did, enlarge or extend the jurisdiction of equity courts. This extension aroused a storm of protest (See Warren, op. cit., pages 96 to 97).

It seems, therefore, that the Senate, in dealing with Section 16 of the draft bill, was faced with two alternatives. It either could have deleted the whole section as it appeared in the draft bill, which was in fact proposed by Patterson, of New Jersey (See Warren, page 96), or it could have amended and modified the section and given it its present form which is declaratory of the principles of common law with respect to courts of equity. As the section was already in the draft bill, it is only natural that the Senate, instead of following Patterson's suggestion and deleting the whole section, chose to amend it and give it its present form.

The fact, however, that Patterson moved to "dele" the whole section is in itself significant. Patterson was apparently of the opinion that by failing to provide in the

Judiciary Act for the jurisdiction of the federal equity courts, they would have the same jurisdiction which they possessed at common law, that is, jurisdiction only where a "plain, adequate and complete remedy" might not be had at law. Patterson obviously objected to extending the equity powers of the courts, whether for constitutional or other reasons; and he likewise apparently felt that it was supererogatory to provide for a jurisdiction which they would have had anyway in accordance with their powers at common law.

The fact that the Senate did not adopt Patterson's suggestion and "dele" the section, but rather amended it so as to make it declaratory of the principles of the common law, does not mean that the First Congress felt the necessity of incorporating a declaratory section into the Judiciary Act. On the contrary, they simply took what they already had in the draft bill and, probably for purposes of convenience and to avoid rearranging and renumbering sections and the like, amended and modified Section 16 of the draft bill in such a manner as to make it declaratory of the powers of equity courts as they existed at common law.

The history of *Section 34*, the Rules of Decision Act, is quite different. If that section in its present form is declaratory of the Judiciary Article of the Constitution, it was so at the time it was first proposed. No change has been made in that respect. The original section provided that the

> "* * * Statute law of the several states in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise, * * * shall be regarded as rules of decision in the trials at common law * * *." (Warren, op. cit., pages 86 to 87.)

The original section, so far as the question whether it is declaratory or limitational is involved, was thus identical with the modification in Ellsworth's handwriting which was incorporated into the Act and is now *Section 34* in its present form. The only change made in the original section was the substitution of the phrase "laws of the several states" as a *generic* term (so held by this court in the *Erie* case) for the specific and particular terms "statute law and unwritten or common law."

In other words, the original section required the federal courts to follow the applicable state decisions in matters of both common and statutory law. This court in the *Erie* case has held that the present form of Section 34 imposes a similar obligation upon the federal courts even though it does not enumerate the various kinds of state law. Hence, if the Rules of Decision Act is merely declaratory of the judicial power derived from the Constitution and is not a limitation on the Judiciary Article of the Constitution, it was declaratory both originally and in the modification which was adopted by the Senate and incorporated into the Act in its present form.

This history of Section 34, as proposed and as finally adopted by Congress, discloses that it is the only section in the whole Judiciary Act which as originally proposed would be declaratory of the constitutional power of the federal courts, if what this court said of the constitutional question in the *Erie* case is correct. We have seen that Section 16, although declaratory in its final form, was in fact, when originally proposed, a grant or enlargement of the powers of the judiciary under the Constitution or at common law. Only Section 34, therefore, would remain as a purely declaratory section, both as originally proposed and as finally adopted by Congress.

Surely, it is anomalous that the First Congress, familiar as it was with the intent of the Constitutional Conven-

tion with respect to the judiciary, should incorporate a merely declaratory provision in the plan which was devised in 1789 for the federal judiciary. When the court considers the fact, that *Section 34*, if merely declaratory, would thus stand alone in the whole Judiciary Act as evidence of the attempt of the First Congress to do a futile thing and incorporate a provision which had no meaning in itself, the court must conclude, as appears obvious to us, that *Section 34* is not in fact declaratory, but a limitation on the Judiciary Article of the Constitution.

There is no need to speculate whether such a limitation on the Judiciary Article of the Constitution is constitutional. Certainly, the First Congress was familiar with the scope and meaning of that Article. Half of the members of the Senate Committee, which drafted the judiciary bill, were members of the Constitutional Convention, and two of them, Patterson and Few, were signers of the Constitution. These men certainly knew whether the Judiciary Article of the Constitution conferred broader powers than the First Congress was willing to grant to the federal courts. Certainly, all the members of Congress at that time were familiar enough with the Judiciary Article, which had been promulgated by the Convention only two years prior to the enactment of the judiciary law and in fact had become legally operative only a few months (March 4, 1789) prior to the passage of the Judiciary Act. *Owings vs. Speed*, 5 Wheat. 420 (1820).

(d) The Judiciary Article of the Constitution.

Article III of the Constitution of the United States provides:

> "Section 2. (1) The *judicial power* shall extend to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their

> Authority;—to *all* Cases affecting Ambassadors, other public Ministers and Consuls;—to *all* Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—(to Controversies) "between a State and Citizens of another State;—(to Controversies) "between Citizens of different States;—(to Controversies) "between Citizens of the same State claiming Lands under Grants of different States, and" (to Controversies) between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." (Italics ours.)

The first section of the article likewise provides that

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. * * *"

The first section thus deals with the courts which are to be the guardians of, or in which is to be vested, the judicial power of the United States; and the second section, clause (1) deals with the subject matter to which that judicial power shall extend. The first section may be said to be distributive of the judicial power in a judicial or jurisdictional sense and to create or provide for a classification or stratification of courts. The second section, clause (1), may be said to be distributive of the subject matter or contents on which the distributive, jurisdictional power acts.

A first observation should be made with respect to this article of the Constitution. It does not provide for, deal with or confer "jurisdiction" on the federal courts. It goes beyond that. It provides for, deals with and confers upon the federal courts *judicial power*. It does not merely give them power to act in a particular instance, such as law, equity, admiralty, etc., which would be their jurisdiction. It gives them *judicial power* completely to dispose of every matter over which they have jurisdiction. The grant of

jurisdiction is thus implicit and included in the grant of judicial power. This distinction has been pointed out by Mr. Warren in his "The Making of the Constitution" (1928), pp. 331-32.

Judicial power is the exercise by a court, that has once obtained jurisdiction of the subject matter, of all the functions and powers which the courts were then in the habit of exercising. This, of course, includes the power of a court to decide a particular controversy independently of any other court except its own ultimate reviewing court. This means the power of the court to determine any substantive or procedural question in accordance with the court's understanding of the applicable principles of common or statutory law, if a matter of first impression, and in accordance with the applicable principles of law governing the situation as previously laid down by the ultimate reviewing court.

It is no accident that Article III is a grant of *judicial power* and not merely of jurisdiction. The Judiciary Article, as originally proposed to and discussed by the Constitutional Convention of 1787, provided that the "jurisdiction" of the federal courts should extend to certain subject matters. See I Journal of the Debates, United States Constitutional Convention, 1787, (Gaillard Hunt Ed.—G. P. Putnam's Sons, 1908), p. 17 (9 Res^{d}—The Randolph Plan); *id.* p. 29, Article IX (The Pinckney Plan); *id.* p. 136 (13 Res^{d}—Report of the Committee of Whole on the Randolph Plan); *id.* p. 141 (5 Res^{d}. The Patterson Plan*); *id.* p. 163 VII (The Hamilton Plan).

All of these plans and the report of the Committee of the Whole were proposed to and considered by the Convention from Tuesday, May 29, 1787, to Monday, June 18, 1787.

* The Patterson Plan was federal and anti-national and considerably restricted the jurisdiction of the federal courts. The language used in the Patterson Plan is "that the judiciary so established shall have authority * * *." Neither "jurisdiction" nor "judicial power" is employed in the Patterson Plan.

Thereafter, they underwent further discussion and were subject to extended deliberation. On August 27, 1787, the Convention finally moved to strike out the word "jurisdiction" where it occurred in the Judiciary Article and to substitute the phrase "Judicial Power." *2 Records of Federal Convention*, (Ed. Farrand, 1937) 425; see also *Remarks of Messrs. Madison and Govr. Morris, id.* p. 431.

If this court had not declared in the *Erie* case that the Rules of Decision Act was merely declaratory of the Judiciary Article and not a limitation thereon, it would seem obvious to an impartial student of language that Article III of the Constitution not only confers jurisdiction (in the grant of *judicial power*) upon the federal courts over certain subject matters, but in conferring such jurisdiction, it has given an affirmative grant to the federal courts of an independent power to determine all cases and controversies in accordance with the substantive principles of law that were then recognized or were subsequently to be formulated by the federal courts. The grant of *judicial power* by the third Article of the Constitution is an affirmative grant to the federal courts to determine all controversies that come before them in accordance with their sense of right and justice and the *appropriate* principles of law governing such controversies.*

It should be borne in mind in attempting to interpret Article III of the Constitution that we are dealing with a written instrument in which certain language has been used. In accordance with fundamental principles governing the

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* We say "appropriate" and not "applicable"; for it is by virtue of the Rules of Decision Act that the federal courts are bound to determine controversies in accordance with the principles of law applicable to such cases. The applicable law under the Rules of Decision Act is, of course, the law of the several states; but under the Judiciary Article of the Constitution, the federal courts have power to dispose of the controversies that come before them in law, equity, admiralty, etc. That can only mean that they have power to determine the controversies in accordance with their own independent sense of right and justice and in accordance with *appropriate* principles of law, whether known at the time or subsequently evolved.

interpretation of written instruments, whether contracts, deeds, wills, statutes, or constitutions, the essential and in fact the only point which should be of aid to a court in construing such instrument is the language used by the parties in setting down their thoughts in writing. What the parties intended is absolutely immaterial if their intention were contrary to the express language which they used.

It is, therefore, extremely idle and would be pure legislation for a court to construe a written instrument, such as the Judiciary Article of the Constitution, in accordance with what the court may suppose to have been the intent of the drafters of the Constitution. What those drafters thought is of no consequence. What they said in their finished draft is the only factor which should guide a court.

In construing the Judiciary Article, we are not dealing with vague concepts such as due process of law, equal protection, privileges and immunities, and the like. We are dealing with a concrete expression of the Constitutional Convention with respect to the judiciary. That concrete expression of the intent of the drafters of the Constitution has been construed by this court for one hundred fifty years. This court has consistently held that the federal courts under Article III of the Constitution exercise a coordinate jurisdiction and not a subordinate jurisdiction to that of the state courts in diversity of citizenship cases as well as in other matters.

In the last few years, this court has overruled itself in a number of cases involving the due process, equal protection and commerce clauses, and the court has held that over a long period of time it had read into those vague concepts a significance which was not derived from those clauses as they stand in the Constitution. This court has held that the reading into those clauses of such foreign and alien concepts of due process, equal protection and commerce, actually enlarged their scope, was entirely unwarranted and

should be overruled and set aside despite the sanctity of age which those interpretations had acquired.

When we are dealing with the Judiciary Article of the Constitution, however, we are confronted by no such vague, uncertain concepts. The Judiciary Article is strikingly concrete and there can be no doubt as to its meaning. Certainly, this will become clear when we cite contemporary opinions on its scope and significance. We believe, therefore, that this court should be extremely cautious in overturning a doctrine of constitutional law as to the coordinate nature and independence of the federal courts, which has obtained since the Constitution was adopted. Certainly, the justices of this court, who first ascribed to the federal courts an independent and coordinate jurisdiction, were more familiar with the scope and meaning of Article III than are the jurists of later years. If they construed the concrete language of the Judiciary Article in a concrete manner, and thus ascribed to the federal courts an independent, coordinate jurisdiction, it would appear extremely unwise for later-day jurists to attempt to overthrow this constitutional law as it has existed with respect to the judiciary since the adoption of the Constitution.

The majority of this court, which wrote the opinion in the *Erie* case and expressed themselves on the constitutional question, were motivated no doubt—and the language of that opinion seems to indicate this—by a concept of the relation of the federal to the state governments which is all too commonly held by many members of both bench and bar, and is thoroughly unwarranted by the Constitution itself. That notion seems to be that since the federal government is one of limited, delegated powers (with all other powers reserved to the states), the federal courts exercising diversity of citizenship jurisdiction must, therefore, as a constitutional matter, apply in their courts the same law which would be applied by the state courts. Apart from the

Rules of Decision Act, this is untenable. There is not a word in the Constitution which prevents the federal courts in diversity of citizenship matters from applying their own substantive rules of law quite apart from the decisions of the state tribunals.

This untenable notion of the constitutional subordinacy of the federal courts to the state courts in diversity of citizenship matters is, of course, due largely to the Rules of Decision Act itself. But it is likewise due to the dual and coordinate nature of the judicial system in the United States. Both state and federal courts may pass upon federal questions. Congress has certain delegated powers, the exercise of which constitutes federal questions, which become controversies in the courts, both state and federal. There is no affirmative grant of power to Congress to enact laws which shall obtain solely in a particular state. The states alone, under their reserved powers, have authority to legislate and (apart from the Judiciary Article) their courts to decide questions of state law. From this fissiparousness between purely state and purely federal questions the notion has developed in the minds of many, and certainly found expression in the majority opinion in the *Erie* case, and especially in view of the mandate of the Rules of Decision Act, that the state is supreme in all state questions unless in conflict with the delegated powers of the federal government, and that the federal government is supreme in all questions of delegated authority.

If the Constitution did not have a Judiciary Article, this would certainly be true even in the the absence of a Rules of Decision Act. It is palpably false in view of the incorporation of Article III into the Constitution. That article gives the federal courts *judicial power*. Judicial power means the authority completely to dispose of any controversy presented to the court in a matter over which it has jurisdiction. That power includes the right of the

federal courts in the absence of a Rules of Decision Act independently to determine all controversies within their jurisdiction and judicial power, subject and subordinate to no other tribunal than this court.

If we assume that it was the *intention* of the drafters of the Constitution to make the state law supreme in all state questions, even as the federal law is expressly made supreme in all federal matters, the fact remains that they incorporated the Judiciary Article into the Constitution and by its express terms gave the federal courts power to do otherwise; for that article confers upon the federal courts *judicial power*. In other words, in dealing with the Judiciary Article, we must not confine ourselves to any hypothetical intent which the drafters of the Constitution may be supposed to have had. The sole question is how that intent was expressed in the written instrument which they have handed down to posterity and which has shaped the destinies of this country so long and so well.

(e) Further on the Judiciary Article.

The identical language is used in the Judiciary Article with respect to all the subject matters to which the judicial power of the federal courts extends, except that in respect of some subject matters, the judicial power is comprehensive, and in respect of others, it is limited. The judicial power extends to *all* cases in law and equity which arise under the Constitution, statutes and treaties made by Congress. It extends to *all* cases affecting ambassadors. It extends to *all* cases of admiralty and maritime jurisdiction. It does not extend to all cases (the phrase used is "controversies")* to which the United States shall be a party. It merely extends to (*some*) controversies to which the United

* We do not discuss the separate significance ascribed by this court to the terms "case" and "controversy." So far as *judicial power* is concerned, they are identical.

States shall be a party. It does not extend to all controversies between two or more states. It extends only to (*some*) controversies between two or more states. It does not extend to all controversies between a state and citizens of another state, but merely (to *some* controversies) between a state and citizens of another state. It does not extend to all controversies between citizens of different states. It merely extends (to *some* controversies) between citizens of different states. And the same for controversies between citizens of the same state claiming lands under grants of different states and between a state or the citizens thereof and foreign states, citizens or subjects.

In other words, with the exception of the comprehensiveness of the judicial power in some cases and its limited application in others, the affirmative grant of *judicial power* to the federal courts is identical in all the various cases which are made the subject matter of the exercise of that judicial power. The same judicial power, which is granted to the courts to deal with federal questions, is granted to them to deal with cases affecting ambassadors, with cases between states, with diversity of citizenship cases, with cases to which the United States shall be a party, and the other subject matters.

Now, if the Judiciary Article dealt only with cases in law and equity arising under the Constitution, laws and treaties, and diversity of citizenship cases, it could well be contended, as no doubt the majority of this court in the *Erie* case believed, that the federal courts are supreme in cases involving federal questions because the federal laws and treaties could only be "made" under the authority of affirmatively delegated powers, and that since there is no delegation of power in diversity of citizenship matters or in state questions, the federal courts would be under a constitutional compulsion to follow the state courts. But the Judiciary Article does not stop there. It does not deal only

with the exercise of judicial power in matters involving an affirmative delegation of power to the federal government. It also deals with the exercise of judicial power in controversies between states, in matters of admiralty and maritime jurisdiction, in controversies to which the United States shall be a party, in matters affecting ambassadors, and in controversies regarding land grants and foreign states.

There is not a word in the Constitution, apart from the Judiciary Article itself, which gives Congress or the federal courts power to determine substantive questions involved in the relations between states. There is not a word in the Constitution, apart from the Judiciary Article itself, which gives Congress or the federal courts power to determine substantive questions of admiralty and maritime matters. Although the executive is expressly granted power to receive ambassadors and other public ministers, there is not a word in the Constitution, apart from the Judiciary Article itself, which gives Congress or the federal courts the right to determine substantive questions involving ambassadors and other public ministers. There is not a word in the Constitution, apart from the Judiciary Article itself, which gives Congress or the federal courts the right to determine substantive questions between citizens of the same state arising in connection with land grants of different states. Similarly, there is not a word in the Constitution, apart from the Judiciary Article itself, which gives Congress or the federal courts the right to determine substantive questions between citizens of different states.*

Nevertheless, in all of these cases, including, of course, federal questions, and except, of course, diversity of citizenship questions (due to the Rules of Decision Act), the federal courts, including this court, have assumed to decide

*The "commerce clause" does not do this any more than it confers such power with respect to interstate commerce.

substantive questions of law in all these various relationships even though there is an utter absence of delegated power governing such relations.

Congress, of course, has no delegated power over the substantive rights involved in the relations of two states in such matters as tort, contract and property law. Nevertheless, this court has held that by accepting the Constitution, the states submitted themselves to the *jurisdiction* of this court. And this court has proceeded to dispose of the substantive questions involved in controversies between two states* without considering whether the law of a particular state were applicable, as it might, for example, be in a contract, tort or property question.

Similarly, in respect to admiralty jurisdiction. The Constitution extends the judicial power of the United States to all admiralty and maritime matters. It does not in express language make the jurisdiction of the federal courts exclusive in such matters. We know that immediately prior to the adoption of the Constitution, several states possessed separate admiralty courts and in other states common law courts exercised admiralty jurisdiction. This was parallel to and coordinate with the admiralty jurisdiction exercised by the courts of the Confederation. See *The Federalist, No. LXXXIII* (ed. Lodge, Putnam, 1888 and 1923, pages 524, 525). We know furthermore that even after the adoption of the Constitution and prior to the Process Act of 1792, admiralty jurisdiction was administered "as well in admiralty courts of the states as in those of the general government." *Manro vs. Joseph Almeida,* 10 Wheat. 473, 490 (1825).

The Judicial Code (*Sec. 256 Amended, 28 USCA, Sec. 371*) of course provides that the federal district court shall

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*N.B.: The judicial power does not extend to *all* controversies between states (as in federal questions, admiralty, etc.), but only to (*some*) controversies between states.

have jusisdiction of all civil causes of admiralty and maritime jurisdiction exclusive of the courts of the several states. But the same section reserves to litigants in such matters their common law remedies. Now, we ask the court to consider whether the Judiciary Article of the Constitution confers upon Congress the power to determine the substantive rights of litigants in causes of admiralty and martime jurisdiction. If it does, then this delegation of power is derived solely from the Judiciary Article, for there is no other grant in the Constitution, except perhaps the commerce clause, which delegates to Congress the power over the means of navigation in which causes of admiralty arise.

But while the commerce clause delegates to Congress the power to control the means of navigation in which admiralty causes arise, it does not grant Congress the power to determine the substantive rights and relations of persons employing the means which Congress is granted the power to regulate. This should, of course, be obvious from the history of the handling of the commerce clause by Congress and by this court, in respect of means of commerce with foreeign nations and among the states other than the means of navigation. Congress, for example, certainly has power to regulate interstate means of transportation, such as railroads and other common carriers, but it has no right to determine the substantive rights of parties to tort, contract and property relations engaged in such interstate commerce.

There is thus under the Judiciary Article of the Constitution no grant of power to the federal courts to determine the substantive relations of parties involved in admiralty and maritime causes. Nevertheless, the federal courts have always assumed to determine such substantive rights in accordance with the *general* admiralty law irrespective of the admiralty law that may have existed in the

states prior to the adoption of the Constitution or thereafter and prior to the Process Act of 1792 (see the *Manro* case, *supra*). And we do not believe at this late stage the power of the federal courts to determine such substantive questions of admiralty law would be or could be successfully challenged.

That power to determine the substantive questions of admiralty law is quite apart from the power of the federal courts to entertain *jurisdiction* of admiralty causes. For the federal courts could theoretically entertain jurisdiction of admiralty causes and yet decide the substantive questions in such matters according to the laws of the state in which the admiralty court was sitting, or according to the admiralty law of Great Britain, or according to the ancient admiralty rules of the civil law. This power to determine substantive questions of admiralty law arises solely from the provision of the Judiciary Article that "the *judicial power*" shall extend to all cases of admiralty and maritime jurisdiction.

For at least three years, between the time when the Constitution became legally operative in 1789 and the enactment of the Process Act of 1792, the federal and state courts were both administering admiralty jurisdiction (see the *Manro* case, *supra*), and were determining the substantive rights of litigants in such matters. The federal courts no doubt determined such questions in accordance with their own conception of the admiralty law. And no doubt the state courts exercising admiralty jurisdiction, whether separately or through their common law courts, inclined to follow the federal courts in such matters. But they were not bound to do so and might have reached entirely different results on the same questions that were decided otherwise by the federal courts sitting in admiralty.

Moreover, the federal courts, in disposing of an admiralty cause identical with one disposed of by the ad-

miralty court of a state, might have reached an entirely different result from that reached by the state court even though the cause arose within the territorial limits of that state and between parties who were citizens of the state. Certainly, the federal courts of admiralty were not bound to follow the state courts in such matters even though the causes were identical and arose within the state's territorial limits and involved citizens of that state. Thus, two citizens of state X in the federal court might obtain an entirely different result from two other citizens of state X in a state admiralty court.

The Judicial Code, as we have seen, preserves the common law rights of litigants in such admiralty matters. These common law rights and remedies will, of course, be determined by the federal courts in accordance with their own conceptions of the common law and not in accord with the conceptions of the applicable common law held by the courts of some state in whose territorial limits the question may have arisen. It is not the *jurisdiction* of the federal admiralty courts implicitly conferred upon them by the Judiciary Article of the Constitution which gives them the power in this manner to reach entirely different results from those which are or might be reached by courts of the various states. It is the grant of *judicial power* which enables the court, having assumed jurisidiction of such causes, completely to dispose thereof in accordance with its own conception of the applicable principles of admiralty or common law and subject only to ultimate review by this court.

In the same way that we have dealt above with controversies between two states and admiralty causes, we might go through every provision of Section 2 (1.) of the Judiciary Article and point out that by virtue of those provisions the federal courts have power to determine the substantive rights of litigants in causes over which the

federal courts have jurisdiction. But we need not do so, for we believe the foregoing discussion proves that the power of the federal courts to determine substantive questions in such matters independently of the courts of any state arises not from some other clause in the Constitution delegating power to the National Government over the subject matter (such as statutes and treaties made pursuant to delegated powers), but derives solely from the provisions of the Judiciary Article itself extending the *judicial power* of the federal courts to the matters over which those courts are impliedly given jurisdiction by that Article.

The identical provisions of the Judiciary Article, which give the federal courts power to determine substantive questions in the relations between states, in admiralty and maritime matters, in controversies to which the United States is a party, in controversies between citizens of the same state involving land grants of different states, give the federal courts judicial power to determine controversies between citizens of different states. The only difference is that in certain controversies the judicial power extends to all such controversies, whereas in diversity of citizenship matters and certain other controversies, it does not extend to all such controversies, but may be limited by Act of Congress and may be shared by the courts of the several states.

It would, therefore, seem obvious that the same grant of judicial power, which permits or enables the federal courts to determine substantive questions of law in admiralty matters, in controversies between states, in controversies between citizens of the same state claiming under land grants of different states, etc., independently and in accordance with their own sense of right and justice, likewise enables and permits the federal courts to determine substantive questions in diversity of citizenship matters

independently of the courts of any state and subject only to ultimate review by this court. *It is, therefore, not the Judicial Article which compels the federal courts in diversity of citizenship matters to apply the laws of the several states.* It is the Judiciary Act of the First Congress which thus imposes a limitation upon the federal courts which is not inherent in the constitutional grant of power.

(f) Contemporary Evidence of Interpretation of Judiciary Article and Powers of Federal Courts Thereunder.

1. General Argument

We need not review the voluminous material available on the question of the origin of and reasons for the incorporation of the diversity of citizenship clause into the Judiciary Article. We need only refer to a few of the salient reasons advanced by the drafters of the Constitution. The principal ones were that the judges of the state courts were known to be venal in many instances, held their positions or tenure of office at the pleasure of the state legislatures, and were not considered by the members of the Constitutional Convention and many other public spirited men of the time competent to pass upon numerous questions of law that would have to be submitted to them, if the state courts were given jurisdiction of the various matters covered by the Judiciary Article of the Constitution. See, for example, remarks of Mr. Madison in *I Journal of the Debates, United States Constitutional Convention, ed. Gaillard Hunt, Putnam, 1908, p. 373, Tues. July 17, 1787.* It was furthermore thought that in causes involving nonresidents of the state, there might be a denial of privileges and immunities to the nonresident (see *The Federalist, No. LXXX*, Lodge ed., p. 479), and especially in view of the venality of the judges of the state courts, that there might be an outcropping of local prejudices against the

nonresident so that he could not obtain a fair disposition of his cause in the state court.

Both of these reasons, which were successfully advanced by the drafters of the Constitution, for the incorporation of the diversity of citizenship clause in the Constitution, are utterly untenable if the Judiciary Article was not thought to grant or did not in fact grant to the federal courts an independent right under the exercise of "*judicial power*" to dispose of the causes before them as they saw fit and not as the state courts might deem proper in identical causes. Hamilton, who urged the privileges and immunities objections, was logically refuted by any number of partisans of the state courts who pointed out that the privileges and immunities could be preserved by granting to the Supreme Court a review of decisions of the state courts in such matters.

The drafters of the Constitution, however, did not see fit to dispose of the matter in this manner to the exclusion of the federal courts. They left some jurisdiction in the state courts and permitted the federal court to exercise concurrent jurisdiction in such matters. Similarly, the point made about the venality of the judges was no argument either for giving the federal courts jurisdiction in federal matters or in diversity of citizenship cases. On the one hand, review of state decisions by this court would have been adequate to deal with any decisions which could be explained only on the basis of the venality of the state judges. On the other hand, that objection failed to consider the way in which even the state courts under venal judges operated in those days as well as at the present.

A court disposes of a matter of first impression in accordance with its own sense of justice and right and disposes of all other matters in accordance with precedent. Even venal judges do not, and in fact could not, in a system of common law courts dispose of causes before them in any

other manner. If they had a precedent on a particular cause, they would have to dispose of a controversy involving a nonresident of the state in accordance with that precedent. If they did not have such a precedent, and the controversy involving the nonresident were *res integra*, they would establish that as a precedent which would govern a future cause between two citizens of the state itself. In other words, the objection to the venality of the judges goes to the *competency* of the judges of the state courts to determine *any* controversy, whether between citizens of the state in which they sit or between a citizen of that state and a nonresident.

Hence, in giving judicial power to the federal courts to determine diversity of citizenship cases, the drafters of the Constitution did not intend to subordinate the federal courts to the state courts, but rather to permit the federal courts to decide independently and reach their own correct conclusions rather than adopt the conclusions of state judges who were thought to be irresponsible, incompetent and venal.

2. Contemporary Records.

The Rules of Decision Act, which was drafted and adopted, as we have seen, by the First Congress, composed as it was of a number of members of the Constitutional Convention and during the same year that the Constitution itself took effect, provides that the laws of the several states shall be regarded as rules of decision "except where the Constitution, treaties or *statutes* of the United States shall otherwise require or provide." To anyone who is unfettered by the vast lore of judicial opinion, it would seem apparent that the Rules of Decision Act itself clearly evinces an understanding on the part of the First Congress that a *statute* of Congress *might* require the federal courts

to reach an independent conclusion and to disregard the laws of the several states in so doing.

The Rules of Decision Act is carefully phrased. Mr. Warren states that it is in Ellsworth's handwriting. Ellsworth was a distinguished barrister and chief justice of this court, and a member of the Constitutional Convention. If Ellsworth, in drafting Section 34, and the First Congress, in adopting it, had intended that a statute of Congress could compel the federal courts to disregard the laws of the state as rules of decision only when that statute was enacted in the exercise of another affirmatively delegated power, such as the commerce, bankrutcy, currency, naturalization and other clauses, Ellsworth and the First Congress could well have said so. Does not this indicate that the Judiciary Article confers upon the federal courts an entirely indepedent, coordinate jurisdiction in diversity of citizenship matters as well as in the other subjects covered therein? Certainly, in the absence of the Rules of Decision Act and without an accumlation of the lore and erudition of the courts since 1789, it would seem that such would be the unmistakable interpretation of the Judiciary Article. Such was the construction given to it by Mr. Justice Reed in his concurring opinion in the *Erie* case. We believe his opinion cannot successfully be challenged, even if we had only the Judiciary Article and the Rules of Decision Act before us.

Other documents bear out this interpretation of the Judiciary Article even more explicitly. In the debate over the repeal of the Adams Circuit Court Act of 1801, a leading Anti-Federalist, Joseph H. Nicholson, spoke thus of the Judiciary Act:

> "* * * it was rightly judged that" (the judicial powers of the federal courts) "should not extend to any other cases of judicial cognizance than those which might be deemed somewhat of a general na-

> ture, and whose importance might affect the general character or general welfare of the nation." 7th Cong., 1st Sess., Feb. 26, 1802. (Cited in Warren, 37 Harv. L. Rev., p. 53.)

Mr. Nicholson, in speaking thus, certainly had in mind the Rules of Decision section which was part of the Judiciary Act. He regarded this, as well as the other subjects dealt with in the Judiciary Act, as a case of a "general nature which might affect the general character or welfare of the nation." Surely, if this is true of the diversity of citizenship provisions and the Rules of Decision section, it is incredible that the federal courts should not possess the power, apart from the Rules of Decision Act, to reach their independent conclusions in substantive questions in diversity of citizenship cases even as they are concededly empowered to do in other matters within their jurisdiction which "affect the general character or general welfare of the nation."

Elbridge Gerry, a member of the Constitutional Convention, who did not sign the Constitution, expressed his objections to the Constitution in this manner:

> "* * * 'My principal objections to the plan are . . . that the judicial department will be oppressive,' 'There are no well-defined limits of the Judiciary powers, they seem to be left as a boundless ocean . . . It would be a Herculean labor to attempt to describe the dangers with which they are replete,'" (Warren, id. pages 54 to 55.)

Mr. Gerry grapsed and understood the significance of the Judiciary Article. That was his objection to the whole Constitution, since he regarded the judiciary provisions as the keystone of the federal or national plan in the Constitution. He did not think that the Judiciary Article in diversity matters subordinated the federal courts to the state courts. He rather thought that the limits of the judicial

powers granted by Article III were "boundless and replete with dangers." The dangers, which he foresaw, were of course the encroachment of the federal judiciary upon the judiciary of the state.

Richard Henry Lee, another leading member of the Convention and a bitter Anti-Federalist who refused to sign the Constitution, at an early day after the adoption of the Constitution favored amendments thereto and urged them strongly upon Congress. One of the principal amendments in which he was interested concerned the Judiciary Article of the Constitution. He felt that the Article conferred too extensive powers upon the federal courts and that these powers could only be abridged by Constitutional amendment. He was, therefore, not in favor of the first Judiciary Act although he himself reported it to the Senate. It was only through the various compromises which resulted in the present form of the Judiciary Act, that Mr. Lee's opposition to the bill was averted or mollified. With respect to the Act and the Judiciary Article, he expressed himself as follows in a letter to Patrick Henry, May 28, 1789:

> "So far as this has gone," (that is, the Judiciary Act) "I am satisfied to see a spirit prevailing that promises to send this system out, free from those vexations and abuses that *might have been warranted* by the terms of the Constitution; * * * it must never be forgotten, however, that the liberties of the people are not so safe under the gracious manner of government *as by the limitation of power,*" (2, *The Letters of Richard Henry Lee;* Warren, id., 62, 63. (Italics ours.)

Representative Nicholas, of Virginia, opposed a change proposed in the Circuit Court Act of 1801 for the following reasons:

> "'He stated that the estate of Lord Fairfax, with the quit rents due thereon, had been confiscated

> during the Revolution by the State of Virginia; notwithstanding the confiscation, the heirs of Lord Fairfax had sold all their rights, which the assignees contended remained unimpaired. It might be their wish to prosecute in a Federal Court, expecting to gain advantages in it which could not be had from the courts of Virginia. His object was to defeat the purpose by limiting the jurisdiction of the Circuit Courts to sums beyond the amount of quit rents alleged to be due by any individual.'" (Jan. 7, 1801, 6th Cong., 2nd Sess.; Warren, *id.*, page 78.)

From this statement is appears that his sole objection to reducing the pecuniary jurisdiction of the federal court was to prevent certain assignees of the heirs of Lord Fairfax from obtaining a more advantageous decision in the federal court than in the state court. This surely proves that Representative Nicholas regarded the Judiciary Article of the Constitution as permitting the federal courts to decide a matter otherwise than the state courts would dispose of it. And the Congress, which accepted Mr. Nicholas' view, must have understood the Judiciary Article as Representative Nicholas did!

Mr. Warren, in his "History of the Judiciary Act," *37 Harv. L. Rev., at 82, ftn. 78,* quotes a contemporary argument in favor of the diversity of citizenship jurisdiction of the federal courts. The argument was made by Mr. Hugh Williamson and was devoted to the remedy which the diversity jurisdiction gave against iniquitous and unconstitutional state paper money, legal tender and stay laws. His argument was that only in the federal courts could a remedy against such iniquitous laws be obtained. With respect to such laws and the better remedy against them that the federal courts could afford, he said:

> "* * * Is it not better to have a Court of Appeals in which the judges can only be determined by the laws of the nation? * * *"

But he does not stop there. He then says:

> "* * * This court is equally to be desired by the citizens of different states."

He thus places the citizens of differeent states in diversity of citizenship cases in the same category as foreigners who would complain about the state law applied in cases of such iniquitous paper money, etc. He assumes, and in fact says, that these courts, which will give relief to foreigners, will apply not the law of the state, which might, as he says, cause a war, but "the laws of the nation." And, speaking of the desire that citizens of different states have of resorting to the same court, he must naturally have expected that same court to apply the "laws of the nation" and not of any particular state.

There was no doubt in the mind of Mr. James Winthrop, who wrote the "Letters of Agrippa," Massachusetts Gazette, Dec. 11, 14, 1787, that the Judiciary Article of the Constitution, as finally adopted by the Convention, conferred upon the federal courts power to determine controversies in diversity of citizenship cases otherwise than the state courts would have disposed of them. In the cited issue of the Massachusetts Gazette, Mr. Winthrop said:

> " 'Causes of all kinds between citizens of different states are to be tried before the Continental Court. *The court is not bound to try it according to the local laws* where the controversies happen; for in that case it may as well be tried in the state court. *The rule which is to govern the new courts must therefore be made by the court itself, or by its employees, the Congress.* * * * Congress, therefore, have the right to make rules for trying all kinds of questions relating to property between citizens of different states. * * * *The right to appoint such courts necessarily involves in it the right of defining their powers and determining the rules by which their judgment shall be regulated.* * * * It is vain to tell us that a maxim of common law required contracts to be determined

> by the law existing where the contract was made; for it is also a maxim that the legislature has the right to alter the common law.' " (Warren, *id.* page 84.) (Italics ours.)

Mr. Warren (*ib.*) says that the Rules of Decision Act was in fact adopted in order to obviate the objections expressed to the Constitution and the Judiciary Article by such writers as Mr. Winthrop. In other words, it is not the Constitution which compels the federal courts to regard the laws of the several states as rules of decision and thereby become subordinate in such matters to the state courts. Mr. Winthrop and the numerous other commentators on the Constitution and the Judiciary Article understood it otherwise. The Judiciary Article gave the federal courts, as Mr. Gerry said (page 130, *supra*), boundless authority, with no well defined limits, to act as entirely independent tribunals without any regard for the state courts or the laws of the several states as rules of decision. It was the Rules of Decision Act and only that which imposed a limitation upon the judicial power conferred by Article III of the Constitution and thenceforth compelled the federal courts to follow the decisions of the state courts on state questions. The court should note what Mr. Winthrop said:

> "* * * The court is not bound to try it according to the local laws where the controversies happen; * * *. The rule which is to govern the new courts must therefore be made by the *court itself*, or by its employees, the Congress. * * * The right to appoint such courts necessarily involves in it the right of defining their powers and determining the rules by which their judgment shall be regulated. * * *"

This is the interpretation which we have given to the phrase "judicial power" as used in Article III of the Constitution. It is the same interpretation which is given to the phrase by Mr. Warren in his "The Making of the Constitution (see p. 113 above).

In *The Federalist*, No. LXXX, Lodge ed., page 496, Hamilton speaks of the wisdom of the Judiciary Article in placing certain controversies within the judicial power of the federal courts. He says:

> "* * * But it is at least problematical, whether an *unjust* sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign. * * *"

Hamilton feared that the state courts, acting independently in relation to foreigners and without any particular prejudice or discrimination against them, would nevertheless reach an unjust conclusion in controversies involving them. It was, therefore, necessary, he thought, to vest the judicial power over such controversies in the federal courts. He further said (*ibid.*) that a great proportion of cases in which foreigners are parties involve national questions. But he thought it wise to place all questions in which foreigners were parties, even those which did not involve national questions, within the judicial power of the federal courts.

In *The Federalist*, No. LXXXIII, Lodge ed., page 527, he said with respect to prize causes:

> "* * * This alone demonstrates the *impolicy of inserting a fundamental provision* in the Constitution *which would make the state systems a standard for the national government* in the article under consideration, and the danger of encumbering the government with any constitutional provisions the propriety of which is not indisputable." (Italics ours.)

Again, on *page 528*, he says:

> "These appeared to be conclusive reasons against incorporating the systems of all the states, in the formation of the national judiciary, according to what may be conjectured to have been the attempt of the Pennsylvania minority. * * *"

In the August Term, 1796, this court decided the case of *Brown vs. Van Braam*, 3 Dall. 343. That case involved the application of the law of Rhode Island to the case before the court. It was contended by the plaintiff in error, represented by Messrs. Howell, Robbins & Dexter, that Section 34 of the Judiciary Act required the federal court to apply the laws of Rhole Island. Apparently, during the argument, Mr. Justice Paterson, who, as we have seen, was a member of the Constitutional Convention and a member of the Senate Committee which drafted the Judiciary Act, spoke as follows:

> "I shall certainly consider myself bound *in some cases* by the practice of the state courts." *3 Dall. at p. 346, ftn. 1.* (Italics ours.)

He did not consider himself bound in *all* cases!*

Mr. Justice Chase said at the same argument:

> "I shall be governed in forming my opinion by what the common law says must be the effect of a judgment by default; without regarding the practice of the state. If indeed the practice of the several states were in every case to be adopted, we should be involved in an endless labyrinth of false constructions, and idle forms."

The defendant in error, represented by Messrs. Barnes & Mifflin, the latter having been a signer of the constitution and a member from Pennsylvania, likewise contended that the Rules of Decision Act required the federal court to apply the state law. In the argument, however, the defendant in error, represented by these distinguished gentlemen, entertained no doubt that in the absence of the Rules of Decision Act, the federal courts would have power to disregard the state law. They said (3 Dall. at page 352):

> "* * * But, on the other hand, it is obvious that any project for a general system of jurisprudence, co-extensive with the union, could only have engen-

* Mr. Justice Paterson had proposed a federal, strongly anti-National plan for the constitution.

> dered discontent, and must have been abortive. To have attempted a theory of law and practice entirely novel, would have occasioned endless perplexity; and to have superceded (sic) the settled practice of some states, in order to introduce the practice of others; to compel, for instance, the lawyers of Massachusetts, to study and enforce the practice of the lawyers of South Carolina, would have occasioned endless jealousy and inconvenience. From these considerations the Congress wisely enacted"

the Rules of Decision Act. But they entertained no doubt that Congress could have "projected a general system of jurisprudence coextensive with the union."

In the *per curiam* opinion in that case, the court affirmed the judgment because of the construction of the laws of Rhode Island by its courts. Mr. Justice Chase, however, *3 Dall, at page 358, ftn. 2,*

> "observed, that he concurred in the opinion of the court; but that it was on common law principles, and not in compliance with the laws and practice of the state."

We now know from the decision of this court in *Erie Railroad Co. vs. Tompkins*, that the court in *Swift vs. Tyson* misconstrued the Rules of Decision Act. Mr. Dana, in his argument in the latter case, urged upon the court the view which was adopted by this court in the *Erie* case (16 Pet. at p. 10). There was no doubt, however, in the minds of the unanimous court in that case but what the Judiciary Article, apart from the Rules of Decision Act, permitted the federal courts to disregard the state law. And Mr. Dana, in his argument, readily conceded that, in urging upon the court the application of Section 34 of the Act to common law decisions. He there said (*16 Pet. at p. 10*):

> "To have attempted to *create a code of laws by legislative enactment* would have been without present avail to the courts; and even with the aid of future experience and after years of labor could not be expected to be perfect."

But he entertained no doubt of the power of Congress to create "a code of laws by legislative enactment."

This imposing array of opinion as to the interpretation of the Judiciary Article of the Constitution by those who were most closely identified with its formulation and promulgation is, in our opinion, conclusive evidence of the scope and significance of that Article, unfettered and unlimited by the Rules of Decision Act. This testimony is unanimously to the effect that the Constitution in the Judiciary Article confers a coordinate and unlimited judicial power upon the federal courts to determine controversies in their own manner and according to their best judgment, unfettered and unrestricted by the decisions of state tribunals.

(g) The Fetish of Uniformity—The Specter of Lack of Uniformity.

The theory of the majority of this court in the *Erie* case appears to be that for all controversies that arise in a particular state, the identical result should be reached by both the state and federal courts to which the questions are presented, and that in all such matters, the federal courts should be subordinate to and should follow the decisions of the state courts. This passionate yearning for uniformity is perhaps a worthy one and certainly accords with the will of Congress as expressed in the Rules of Decision Act as it has now been construed. It is a yearning, however, which has nothing to do with the Judiciary Article of the Constitution and is unwarranted by the language and provisions of that article.

Furthermore, it is impossible of realization as a practical matter. And this court has not hesitated on appropriate occasions to disregard the desire for uniformity of decision. In *Funk vs. United States*, 290 U. S. 371 (1933), this court did not hesitate to lay down a rule of decision

which, for all that appears in the opinion, might have been directly contrary to that accepted by the courts of the state in which the crime in question was committed. The court held that, unfettered in the particular instance by an Act of Congress, the federal courts may arrive at their own independent conclusion on the admissibility of testimony or competency of witnesses. The question concerned the right of a wife to testify on behalf of her husband.

Now, of course, in that case the court was dealing with an act that had been created a crime by Act of Congress. The court may therefore say that the determination of the admissibility of evidence or the competency of witnesses in that case was ancillary to the disposition of the prosecution by the court of an act which was admittedly subject to a delegated power of Congress. The fact remains, however, that the same act, which was a crime by federal statute, might also be a crime against the state in which the federal crime was committed.*

In that state, the law, whether by statute or court decision, might well have held a wife incompetent to testify on behalf of her husband. This court nevertheless felt no hesitancy in reaching a conclusion which Mr. Justice Sutherland pointed out was supported by the weight of authority in the country, but which might nevertheless have been at variance with the application of the state law to an identical crime by the courts of that state. The federal accused might thus be at a considerable advantage or, for that matter, disadvantage over a person accused of an identical crime in the state where the federal crime was committed. Surely, the *Funk* case does not harmonize with a desire to obtain complete uniformity of decision within a particular jurisdiction.

The recent case of *O'Brien vs. Western Union Telegraph Co.*, 113 F. (2d) 539 (C. C. A. 1, 1940), presents a

* See *e.g.* Col. Mason, Docr. Johnson and Messrs. Wilson and Madison in II "Records of the Federal Convention" (ed. Farrand, 1937) 347, 348, 349.

similar situation. The plaintiff there sued the defendant for libel. The sole question on the appeal was whether the defendant, a common carrier, subject to regulation by Congress, was privileged to transmit what the court said was a clearly defamatory communication. The court refused even to consider what the law of either Massachusetts or Michigan where the libel was published might be. The court applied a federal doctrine of privilege to the defendant. We think the case is eminently sound and that the court was warranted in determining the question of privilege as a matter of general federal common law.

Here, again, we point out that absolute uniformity between federal and state courts may be either unobtainable or undesirable. Had the defendant in the *O'Brien* case not been able to remove the case to the federal court, the Massachusetts court might well have held that the defendant was not privileged; and that would not have constituted a federal question reviewable by this court. Even the Circuit Court of Appeals, in disregarding the laws of the two states, admitted that the question of privilege was not in itself a federal question.

VIII. Plaintiff Has Been Deprived of No Rights Under the Constitution of the United States.

This question has been so often decided adversely to the contentions of plaintiff and so often unsuccessfully raised by plaintiff's counsel, Messrs. Smith & Sutherland, that in order to deal with this Constitutional question, we shall merely review the decisions which show that plaintiff's contention must be rejected.

Fritz vs. Westinghouse Electric & Manufacturing Co., 130 O. S. 156, was decided in October, 1935, without opinion. The headnote of the Supreme Court Reporter indicates that the question before the court was whether or not an em-

ployer may be liable, at common law or by statute, in view of Article II, Section 35, of the Constitution, for the contraction of an unscheduled occupational disease contracted through the employer's negligence. The petition in error was dismissed for the reason that no debatable constitutional question was involved. Motion for rehearing was denied by the Supreme Court on October 9, 1935.

Reference to the files of the Supreme Court of Ohio in this case reveals the following: The petition alleged that the plaintiff was employed in the handling of sand and that, through the contamination of the air resulting from handling this sand, he acquired silicosis; that the conditions and resulting disease were caused by the negligence of the defendant in failing to provide reasonably safe devices and equipment and in failing to provide proper ventilation and a safe place to work, all in violation of certain sections of the General Code of Ohio. The plaintiff alleged that the Workmen's Compensation Act provided no remedy for the injuries, and that he therefore sued at law for damages.

The defendant answered by pleading compliance with the Workmen's Compensation Act and the exclusiveness of plaintiff's remedy thereunder. The petition in error in the Supreme Court recited that judgment was granted to the defendant and against the plaintiff on motion made by the defendant for judgment on the pleadings and that relief had been denied the plaintiff on the ground that plaintiff's common law right of action was abrogated by the Workmen's Compensation Act. It was claimed by the plaintiff that the case involved questions arising under Article I, Section 16, of the Constitution of Ohio, and also under Section 1 of the Fourteenth Amendment to the Constitution of the United States. It is therefore manifest that this case holds the Workmen's Compensation Act constitutional and further, that it provides the only relief for an employee who claims to have acquired occupational disease.

Mozingo vs. The Marion Steam Shovel Co., 130 O. S. 591, was decided in February, 1936, without opinion. The petition in error was dismissed for the reason that no debatable constitutional question was involved. The Reporter's headnote indicates that the plaintiff claimed to have been disabled by pneumoconiosis and that the question involved was whether or not there was liability, common law or statutory, in view of Article II, Section 35, of the Ohio Constitution and the provisions of the Workmen's Compensation Act. The *Mozingo* case originated in Marion County, Ohio, the petition having been filed in that county in February, 1935. It is interesting to note that the plaintiff was represented by Mr. Paul D. Smith and Mr. Thomas H. Sutherland, who are the attorneys for the plaintiff in the instant case. From a judgment of the trial court dismissing the petition in the *Mozingo* case, those attorneys prosecuted error to the Supreme Court of Ohio, resulting in the decision above cited. Application for rehearing in the Supreme Court of Ohio was made and was denied in February, 1936. Thereupon the plaintiff (through Attorneys Smith and Sutherland) prosecuted appeal to this court. The court dismissed the appeal without opinion, for want of substantial Federal questions. *Mozingo vs. The Marion Steam Shovel Co.*, 298 U. S. 645 (June, 1936).

Reference to the record in that case (Oct. term, No. 1049) see the amended petition as it was filed in the Common Pleas Court at Marion, Ohio, and, the petition in error in the Supreme Court of Ohio), will demonstrate to this court how completely and exhaustively the possible constitutional questions involved were raised in the *Mozingo* case.

With that record before it, this court held that there was no Federal constitutional question involved. Not being content with two hearings in the Supreme Court of Ohio and one in this court, Mr. Smith and Mr. Sutherland,

plaintiff's counsel, petitioned for a rehearing in this court; and that petition was denied, *Mozingo vs. The Marion Steam Shovel Co.*, 298 U. S. 645 (October, 1936).*

CONCLUSION

This brief has been far too extended to require any more than a very sketchy summary of our argument. We shall merely list the points *seriatim*.

1. The authorities of this court for over a hundred years support our position that when a District Court has correctly applied the law of the state under the compulsion of the Rules of Decision Act, the judgment will not be reversed merely because the state court subsequently changes the state law pending an appeal from the federal judgment. It is unwise to overturn a doctrine of constitutional law involving the jurisdiction of the federal courts that has been sanctioned for such a long period of time.

2. The overruling decision of the Ohio Supreme Court, which plaintiff contends should be applied to the case at bar, does not represent the settled law of Ohio.

3. The *Triff* case, on which plaintiff relies as establishing the law of Ohio, is not a clarifying or declaratory decision which the federal courts, including this court, have in certain instances undertaken to apply to a judgment, which was correct at the time it was rendered. The *Triff* case is an overruling decision which expressly rejects and overthrows a quarter of a century of the settled law of Ohio.

4. We are dealing, not with a single integrated system of courts in which a reviewing court might be induced to apply an intervening decision to a judgment of a lower court, which was correct at the time of its rendition. We are dealing with a coordinate system of courts in which the federal court, acting under the compulsion of the Rules of

* Accord: *Silver vs. Silver*, 280 U. S. 117 (1929) (guest statute abolishes right to recover for negligence); *Fearon vs. Treanor*, 301 U. S. 667 (1937) (statute abolishes right to recover for breach of promise); *Hanfgarn vs. Mark*, 302 U. S. 641 (1937) (do. as to alienation of affections and crim. con.).

Decision Act, must apply the law of the state as announced by its highest court and cannot be held in error for having done so and cannot be reversed because of a subsequent change of state law. The federal courts exercise parallel and coordinate jurisdiction and are not subject to the vicissitudes and the changing opinions of the courts of another jurisdiction.

5. The authorities on which we rely all deal with overruling state decisions and refuse to give them retroactive effect with respect to federal judgments which correctly applied the state law at the time they were entered.

6. The decisions on which we rely all deal with what was formerly called purely local law, that is, questions of local usages, property rights and the construction of state constitutional and statutory provisions. They were never within the rule of *Swift vs. Tyson,* but were always regarded as an exception to that rule and squarely within the provisions of the Rules of Decision Act. They are in nowise affected by the overruling of *Swift vs. Tyson* by this court in the *Erie* case.

7. The determination of the constitutional question by the majority opinion in the *Erie* case, even if sound, does not require this court to reverse the judgment of the court below for failing to give retroactive effect to the overruling *Triff* decision, because all litigants' rights are satisfied so far as the Rules of Decision Act and even the Judiciary Article of the Constitution are concerned when he has had an opportunity to present and have his case heard in a trial court. But, we have accumulated a vast amount of evidence to prove that the determination of the constitutional question by the majority in the *Erie* case is unsound. The concurring opinion of Mr. Justice Reed in that case was right. The sole limitation and restriction imposed upon federal courts in diversity cases in respect to the law of the state is to be found in the Rules of Decision Act and not

in the Judiciary Article of the Constitution. The Rules of Decision Act is a limitation on the Judiciary Article and not declaratory thereof. It applies only to "trials at common law."

8. The desire for *complete* uniformity of decision is an impractical one, impossible of attainment, and often undesirable.

9. The judgment of a federal court in a diversity case, when it correctly applies the state law, must stand in that respect. There must be an end to litigation and an end to the constant changes which would be made in federal judgments if the federal courts were required to change their judgments every time the law of a state is changed by judicial decision. The federal courts, having the power to refuse to give retroactive effect to overruling state decisions, should, therefore, as a purely practical matter, and as a question of convenience, refuse to give them retroactive effect on federal judgments which were correct at the time they were rendered, and should thus avoid the endless confusion that would otherwise result.

10. An overruling decision of the state courts cannot be given retroactive effect on a judgment of the federal courts in diversity of citizenship cases because the federal litigants, being in a coordinate system of courts, have no means of attacking the overruling state decision and persuading the state court of its unsoundness.

11. The court should consider the effect of the rule for which plaintiff contends. If plaintiff had obtained a judgment for $125,000, which was correct under the applicable state law at the time it was rendered, we do not believe that this or any other court would deprive plaintiff of that judgment merely because a state court had after such judgment overruled itself and held that one in the plaintiff's position did not have a cause of action.

It is therefore respectfully submitted that the judgment of the court below should be affirmed on both reason and authority.

Respectfully submitted,

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Toledo, Ohio, Dec. 7, 1940.

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SUPREME COURT OF THE UNITED STATES.

No. 141.—October Term, 1940.

Virginia Vandenbark, Petitioner,
vs.
The Owens-Illinois Glass Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 6, 1941.]

Mr. Justice Reed delivered the opinion of the Court.

This certiorari brings before us for review the determination of the Circuit Court of Appeals that cases at law sounding in tort, brought in the federal courts on the ground of diversity of citizenship, are ruled by the state law as declared by the state's highest court when the judgment of the trial court is entered and not by the state law as so declared at the time of entry of the appellate court's order of affirmance or reversal. We granted the certiorari because of the uncertainty of the law upon this question as contained in this Court's former decisions.

The petitioner here, Virginia Vandenbark, the plaintiff below, is a citizen of Arizona. The defendant, respondent here, the Owens-Illinois Glass Company, is a corporation of Ohio. Petitioner brought an action in the United States District Court for the Northern District of Ohio alleging that as an employee of respondent she had contracted various occupational diseases including silicosis through the negligence of respondent. The trial court sustained a motion to dismiss on the ground that the petition failed to state a cause of action. This ruling was affirmed by the Circuit Court of Appeals with the statement that under the law of Ohio no recovery was permitted, at the time of the judgment in the trial court, for the type of occupational disease alleged by the petitioner to have been contracted by her as the result of respondent's negligence.[1]

It is conceded that at the time the motion to dismiss was sustained neither the Ohio Workmen's Compensation Act[2] nor the common

[1] Vandenbark *v.* Owens-Illinois Glass Co., 110 F. (2d) 310, 312.
[2] Ohio Gen. Code (Page, 1937) § 1465-70.

law, as interpreted by the supreme court of that state, gave a right of recovery to petitioner. The constitution of Ohio[3] authorized the passing of laws establishing a state fund out of which compensation for death injuries or occupational diseases was to be paid employees in lieu of all other rights to compensation or damages from any employer who complied with the law. At the time of the dismissal of the petition by the trial court no provision had been made by statute for any of the occupational diseases included in petitioner's complaint. Respondent had fully complied with the Workmen's Compensation Act. The Ohio constitution and compensation statutes passed pursuant to its authority had been consistently construed by the Ohio courts as withdrawing the common law right and as denying any statutory right to recovery for petitioner's occupational diseases.[4] After the action of the trial court in dismissing the petition, the Ohio supreme court reversed its former decisions and, in an opinion expressly overruling them, declared occupational diseases such as complained of by petitioner compensable under Ohio common law.[5]

While *Erie Railroad* v. *Tompkins*[6] made the law of the state, as declared by its highest court, effective to govern tort cases cognizable in federal courts on the sole ground of diversity, there was no necessity there for discussing at what step in the cause the state law would be finally determined. In that case no change occurred in the state decisions between the accident and our judgment. There is nothing in the Rules of Decision section to point the way to a solution.[7]

During the period when *Swift* v. *Tyson*[8] (1842-1938) ruled the decisions of the federal courts, its theory of their freedom in matters of general law from the authority of state courts pervaded opinions of this Court involving even state statutes or local law. As a

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[3] Art. 2, § 35.

[4] Zajachuck *v.* Willard Storage Battery Co., 106 Ohio St. 538; Mabley & Carew Co. *v.* Lee, 129 Ohio St. 69, 73.

[5] Triff *v.* National Bronze & Aluminum Foundry Co., 135 Ohio St. 191, 205.

[6] 304 U. S. 64.

[7] U. S. Code, Title 28, § 725. "Laws of States as rules of decision. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

[8] 16 Pet. 1.

consequence some decisions hold that a different interpretation of state law by state courts after a decision in a federal trial court does not require the federal reviewing court to reverse the trial court.[9]

In *Burgess* v. *Seligman*, cited in the preceding note, a statute of Missouri relating to the liability of stockholders of a Missouri corporation was interpreted by the state supreme court contrary to the prior decision of the federal trial court. This Court affirmed the trial court, saying

"So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."[10]

What we conceive, however, to be the true rule to guide a federal appellate court where there has been a change of decision in state courts subsequeent to the judgment of the district court was stated, before any of the opinions just cited, in *United States* v. *Schooner Peggy*.[11] The Court there said

"It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."

It is true this Court was speaking of the intervention of a treaty and also that it expressed a caution against retrospective operation between private parties but the principle quoted has found acceptance in a variety of situations. *Kibbe* v. *Ditto*[12] and *Moores* v. *National Bank*[13] hold that subsequent decisions as to married women's rights control review. *Sioux County* v. *National Surety Company*[14]

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[9] Pease *v.* Peck, 18 Hqw. 595, 599; Morgan *v.* Curtenius, 20 How. 1; Burgess *v.* Seligman, 107 U. S. 20, 33; Concordia Insurance Co. *v.* School District, 282 U. S. 545, 553.

[10] Cf. Kuhn *v.* Fairmont Coal Co., 215 U. S. 349, 356.

[11] 1 Cranch 103, 110.

[12] 93 U. S. 674; see discussion of this case in Bauserman *v.* Blunt, 147 U. S. 647, 655-56.

[13] 104 U. S. 625, 629.

[14] 276 U. S. 238, 240.

gives effect to a later decision on a statute as to surety bonds. In *Oklahoma Packing Company* v. *Oklahoma Gas Company*,[15] we applied as determinative a state decision, clarifying the local law, handed down after the decree then under consideration here.

While cases were pending here on review, this Court has acted to give opportunity for the application by the lower courts of statutes enacted after their judgments or decrees.[16] It has vacated judgments of state courts because of contrary intervening decisions,[17] and has accepted jurisdiction by virtue of statutes enacted after cases were pending before it.[18] Where, after judgment below, a declaration of war changed the standing of one litigant from an alien belligerent to an enemy, this Court took cognizance of the change and modified the action below because of the new status.[19] Similarly repeal of criminal laws or of a constitutional provision without a saving clause deprives appellate courts of jurisdiction to entertain further proceedings under their sanctions.[20] These instances indicate that the dominant principle is that *nisi prius* and appellate tribunals alike should conform their orders to the state law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered.

Respondent earnestly presses upon us the desirability of applying the rule that appellate courts will review a judgment only to determine whether it was correct when made; that any other review would make the federal courts subordinate to state courts and their judgments subject to changes of attitude or membership of state courts, whether that change was normal or induced for the purpose of affecting former federal rulings. While not insensible to possible complications, we are of the view that, until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the

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[15] 309 U. S. 4, 7-8.

[16] Dinsmore *v.* Southern Express Co., 183 U. S. 115; Missouri ex rel. Wabash Ry. *v.* Public Service Comm., 273 U. S. 126, 130; Carpenter *v.* Wabash Ry. Co., 309 U. S. 23, 26.

[17] Gulf, Colorado & Santa Fe Ry. Co. *v.* Dennis, 224 U. S. 503; Dorchy *v.* Kansas, 264 U. S. 286, 291; Patterson *v.* Alabama, 294 U. S. 600, 607.

[18] Stephens *v.* Cherokee Nation, 174 U. S. 445, 478; Freeborn *v.* Smith, 2 Wall. 160, 174.

[19] Watts, Watts & Co. *v.* Unione Austriaca, 248 U. S. 9, 21.

[20] United States *v.* Chambers, 291 U. S. 217, 222.

then controlling decision of the highest state court.[21] Any other conclusion would but perpetuate the confusion and injustices arising from inconsistent federal and state interpretations of state law.

Judgment reversed.

Mr. Justice McReynolds concurs in the result.

Mr. Justice Stone took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

END

[21] We have applied the rule enunciated in the case of Erie Railroad *v.* Tompkins, 304 U. S. 64, that state law as determined by the state's highest court is to be followed as a rule of decision in the federal courts, to determinations by state intermediate appellate courts. West *v.* American Telephone & Telegraph Co., Nos. 44, 45; Fidelity Union Trust Co. *v.* Field, No. 32; Six Companies of California *v.* Joint Highway District, No. 267; Stoner *v.* New York Life Insurance Co., No. 74, all of this term.